16 Am Jur 2d Constitutional Law Summary

Constitutional Law Summary

Scope:
This article deals with the basic principles of the American constitutional system, the federal and state constitutions and their nature, characteristics, functions, adoption, amendment, construction operation, and effect. Included herein is discussion of doctrines applicable to the determination of the constitutionality of statutes, the sources, distribution, and separation of government powers and functions, and fundamental constitutional rights and guarantees.

Federal Aspects:
General aspects of constitutional law (such as adoption and amendment of constitutions, rules of construction, and the determination of the constitutionality of statutes) which have application to the United States Constitution as well as to other constitutions are discussed in this article. Also included in this article are treatment of specific aspects of federal constitutional law, such as the distribution of powers between the state and federal governments and the separation of powers within the Federal Government, as well as the nature and scope of specific federal constitutional rights and guarantees, such as those involving the equal protection of the laws, due process of law, the privileges and immunities of citizenship, obligation of contracts, ex post facto laws, and bills of attainder. See "Federal Legislation," below, for USCA citations.

1 Definition and nature of "constitution" and "constitutional law," generally
As used herein, the word "constitution" means a declaration of fundamental laws or principles for the government of a nation or state. A constitution represents the supreme written will of the people regarding the framework for their government. Where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and it is the paramount authority for all that is done in pursuance of its provisions. A constitution thus embodies fundamental values and articulates the citizens' common aspirations for constitutional governance and the rule of law. A state constitution is likewise the supreme written will of the people of a state regarding the framework for their government and is subject only to the limitations found in the Federal Constitution. Although a constitution may be either written (as in the case of the United States) or unwritten (as in the case of Great Britain), the word "constitution," as applied to the organization of our federal and state governments, always implies a written document which is understood to have been enacted by the direct action of the people, providing for the form of their government and defining the powers of the several departments within it, thus creating a fundamental law which is absolute and unalterable except through amendment by the people from which it emanated.

Constitutional law, which deals with the interpretation and construction of constitutions and the application of this fundamental law to statutes and other public acts because of the American governmental system, occupies an extremely important position in the jurisprudence of this country, because constitutions in this country, rather than stating inflexible specific rules of conduct, contain broad principles capable of accommodating societal changes. Thus, constitutional provisions gather meaning from the experience of the people, and courts should expect that modern society will mold and shape constitutional principles into new and useful forms.
2 Distinction between constitutions and statutes
A constitution differs from a statute in that a statute ordinarily provides some details of the subject of which it treats, whereas a constitution usually states broad general principles and builds the substantial foundation and general framework of the law and the government. The constitution is the framework of the government containing the general principles upon which the government must function, intended not merely to remedy existing conditions, but to govern future contingencies. It is a compilation of fundamental laws of the jurisdiction, and embodies principles upon which the jurisdiction's government was founded. It represents the will of the sovereign people, deriving its force directly from the people themselves. Statutes, by contrast, are enactments and rules for the government of civil conduct, promulgated by the legislative authority of a state. Instead of general principles, a statute provides details of the subject of the statute.

Because constitutions constitute the supreme law, they preempt contrary statutes or rules, and stand above legislative law. Thus, where a constitution speaks plainly on a particular matter, it must be given force and effect as the paramount law, and where a statute or other rule and a constitutional provision are in conflict, the constitutional provision must prevail.

Observation: It has been said that a constitution is but a higher form of statutory law, so that, for example, the state constitution is looked to where a court is searching for statutory law on a subject, and there is no relevant "statute" per

se. In any event, both constitutional and statutory principles should be liberally construed to further the goal of allowing the people to express their will.

3 Characteristics of constitutions

The two most common characteristics of constitutions are their permanency and their generality. The term "constitution" implies an instrument of a permanent and abiding nature. A constitution is intended not merely to meet current conditions, but also to govern future ones. The United States Constitution is said to be a law for the rulers and the people, equally in war and in peace, and to cover with its shield of protection all classes of persons, at all times, and under all circumstances.

Although the permanent nature of a written constitution may at times seem to stand in the way of progress, its stability is intended to protect the people from frequent and violent fluctuations of public opinion, since the state and federal constitutions are limitations on the power of the people as against the impulses of mere majorities.

Since it is recognized that the framers of a constitution cannot anticipate conditions which may arise thereafter in the progress of the nation or establish all the law which from time to time may be necessary to conform to the changing conditions of a community, constitutions traditionally do not deal in details, but enunciate the general principles and general directions which are intended to apply to all new facts which may come into being and which may be brought within these general principles or directions. Such generality permits flexibility in construction to meet the changing conditions of society.

4 Functions or purposes of constitutions

The most important purpose of a constitution is to furnish the basis for the government it establishes, that is, to prescribe the permanent framework of the system of government, assign to the different departments their respective powers and duties, and establish certain fixed first principles on which the government is founded. Thus, the United States Constitution is a primer of fundamental principles for the conduct of a developing federal system rather than a manual of technical rules. It has been said that the purpose of the United States Constitution was to take government "off the backs" of the people.

One important function of a constitution is to safeguard and promote the public welfare, which involves the safety, prosperity, health, and happiness of the people. The Supreme Court has said that the people of the United States erected their constitutions or forms of government to establish justice, to promote the general welfare, and to secure the blessings of liberty. Another of the great purposes of a constitution is to preserve the rights of individual citizens by protecting their lives, liberty, and property. To this end, and in order that the constitutional system may be a government of laws and not of men, it is customary for constitutions to prescribe and limit the powers of the government and thereby to operate as bulwarks of liberty for the protection of private rights. Thus, one of the primary functions of a constitution is to protect the people against arbitrary actions by their own government or by the courts thereof. Indeed, public policy considerations cannot override constitutional mandates.

5 Generally

The United States is a constitutional democracy. The constitutional form of government as it exists in the United States is based on the fundamental conception of a supreme law, expressed in written form, in accordance with which all private rights must be determined and all public authority administered.

Constitutional government by the people represents the greatest and grandest struggles of humanity for its betterment, and in its accomplishment marks the uttermost political accomplishment of the human race. The limitations imposed by the American system of constitutional law on the action of the governments, both state and national, are deemed to be essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. In the United States, the right of sovereignty is vested in the people and is exercised through the joint action of the federal and state governments. Upon entering the Federal Union, the states retained all the power and sovereignty of the original states, except such as was surrendered to the Federal Government.

6 Effect of British constitutional law theory

Although there can be no doubt that the United States Constitution is derived in many, if not most, respects from the British "unwritten" constitution, the English Declaration of Rights of 1689, and the English common law, those who pay great homage to the English common law and its constitutional system sometimes fail to recognize that the essential difference between the English and American Constitutions is not that the English Constitution is unwritten and the American Constitution is written, but that the English system is founded on the concept of parliamentary supremacy, whereas the American constitutional theory is founded on the concept that sovereignty itself resides with the people.

Where the people are sovereign, their conception of their constitution exists apart from, and above, any transient legislative enactments.

According to the theory of the English Constitution, absolute despotic power must reside somewhere in all governments, and in Britain this power is entrusted to Parliament. The power of the British Parliament is so transcendent that it cannot be confined, either for causes or persons, within any bounds. This principle of the omnipotence of Parliament, however, has not been applied to legislative bodies in America. Thus, it is recognized that the Congress of the United States as a legislative body is not vested with judicial powers, as is the British Parliament.

Observation: The right of the United States Senate to try all federal impeachment cases is nonetheless somewhat reminiscent of the judicial power of the English House of Lords.

In the United States, the Congress and all of its members, as well as the President of the United States, all state and federal officials, and all state and federal courts and judges are as bound by the United States Constitution as are ordinary citizens.

7 Pre-Constitution national documents: Declaration of Independence; Northwest Ordinance; Articles of Confederation

While statements of principles contained in the Declaration of Independence do not have the force of organic law and therefore cannot be made the basis of any judicial decision as to the limits of rights and duties, yet it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence, and the courts have sometimes referred to the Declaration in determining constitutional questions.

On July 13, 1787 -- two years before the Constitution of the United States was adopted -- Congress enacted the Northwest Ordinance. Captioned "An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio," this landmark legislation -- which was to have a profoundly important effect on the subsequent development of both state and national law -- was the fundamental instrument of government for an area covering more than a quarter-million square miles. The territory to which the ordinance applied included all of present-day Michigan, Indiana, Illinois, Wisconsin, and Ohio, and part of Minnesota. The federal courts have generally held that the Ordinance was superseded by the adoption of the Constitution of the United States on the ground that the Constitution places all the states of the Union on an equal basis, which would not be the case if the Ordinance continued to be in force after the adoption of the organic law. Even after the adoption of the Constitution, however, some of the provisions of the Ordinance were continued in force by acts of Congress during the period of the territorial government of the Northwest Territory.

In both the federal courts and those of the states created out of the Northwest Territory, the doctrine that the Ordinance has been superseded by the state constitution when a new state has been admitted to the Union is adhered to, and no effect is given to that Ordinance except insofar as its principles may have been embodied in the state constitution.

Following the Revolutionary War, the Articles of Confederation were drafted in 1777 and submitted by the Continental Congress to the state legislatures for approval, but they were not approved by all the states until 1781. The situation has been succinctly described by a commentator. The newly independent states did not favor a centralized executive authority, and the government ultimately created by the Articles of Confederation amounted to little more than a loose confederation of states that derived its authority from acceptance of the principles of the confederation by the state legislatures through ratification. The Articles created a government with a single branch of government -- a Congress with members appointed by the state legislatures. Congress was given the sole and exclusive power to make war and peace, to enter into treaties and other alliances, to coin money, to establish a postal system, to send and receive ambassadors, and to control commerce with the Indian tribes. Congress was not given the power to levy direct taxes or to exercise any authority over interstate and foreign commerce. Experience with the Articles of Confederation indicated many of its defects, but nevertheless, the convention that convened in May 1787 was to amend the Articles of Confederation, rather than to jettison them in favor of a new constitutional document, although the convention resulted in a newly drafted (and current) constitution for the United States.

8 Purpose, application, and effect of United States Constitution

The several states were in existence as separate sovereignties under the Articles of Confederation prior to the adoption of the Constitution of the United States. The Constitution brought into being a nation and a closer union rather than a league of separate states.

Although providing for the common defense is one of the purposes of the Federal Constitution, it was not formed merely to guard the states against danger from foreign nations, but mainly to secure both union and harmony at home and safety against injustice. It was designed for the common and equal benefit of all the people of the United States, as well as to create a national economic union.

The principal features of the American system of government established by the United States Constitution include representative government, dual government involving both state and federal aspects, the securing of individual rights and liberties through constitutional restrictions, and a separation of powers among the legislative, executive, and judicial branches of either government, as well as between the governments themselves.

The Constitution of the United States was ordained and established, not by the states in their sovereign capacities, but, as the Preamble to the Constitution declares, by the people of the United States, and was adopted as their voluntary act for their own protection. It was particularly intended to affect individuals rather than states.

The provisions of the United States Constitution must be given full force and effect throughout the Union, because it is the supreme law of the land. Thus, the Federal Constitution is in reality a part of the constitution of every state and may be so regarded in determining the validity of legislative acts. It operates alike on all the states and the District of Columbia, and, by statute, Congress has also extended specific provisions of the United States Constitution to Guam, the Virgin Islands, and Puerto Rico.

Observation: Although Puerto Rico has attained status as a commonwealth, it is still considered a "state" or "territory" for the purpose of various federal statutes.

9 State constitutions

Under the American system, each state was left free to establish a constitution for itself, and in that constitution to provide such limitations and restrictions on the powers of its particular government as its judgment might dictate. A state constitution and the statutes of the state are to be taken together as making one body of law. However, a state's statutory law is subordinate to the state's constitution, inasmuch as the state's constitution is the supreme law of the state, and is second in that state only to the United States Constitution in importance and precedence.

10 United States Constitution

Adoption of the Constitution of the United States is traceable to the people's disappointment with the confederation of states which they had formed in the warmth of mutual confidence after the Revolutionary War. Experience had made it clear that a national government was required for national purposes. Because of this, they determined to establish a federal or national union of states, for the purposes set forth in the Preamble to the Constitution, which recites: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

The Federal Convention met in 1787 to write the present Constitution of the United States. Several drafts of it were presented for the consideration of the Convention. In September, 1787, the Convention completed the great work in which it had been engaged and resolved that the Constitution should be laid before the Congress of the United States, to be submitted by that body to conventions of the several states, to be convened by their respective legislatures. The Convention expressed the opinion that as soon as the Constitution should be ratified by the conventions of nine states, Congress should fix a day on which electors should be appointed by the states, a day on which the electors should assemble to vote for President and Vice President, "and the time and place for commencing proceedings under this Constitution."

When the conventions of more than nine states adopted the Constitution, Congress, on September 13, 1788, passed a resolution in conformity with the opinions expressed by the Constitutional Convention and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place, "for commencing proceedings under the Constitution." The Constitution went into effect March 3, 1789.

The original version of the United States Constitution sent to the states for ratification in 1787 did not contain a Bill of Rights and did not otherwise address the issue of religious freedom. The public demand for protection of their rights was reflected in the various states' ratifying conventions. Most of these conventions called for the inclusion of a Bill of Rights in the United States Constitution and patterned their recommendations after their own constitutions and declarations of rights.

It is within the power of the people who made the Federal Constitution to unmake it. It is the creature of their own will and exists only by their will.

11 State constitutions

The various states in the United States have from time to time adopted state constitutions which declare and guarantee the rights and liberties of the individual.

Governmental authority in each state is vested by the state constitutions in the three great divisions of government: the executive, legislative, and judicial authorities. The agencies or departments so created are the agents of the people. They are, in general, separate and distinct departments or agencies independent of each other except to the extent that the action of one is made to constitute a restraint upon the others to keep them within proper bounds and prevent hasty and improvident actions.

Some state constitutions contain a mandatory provision for periodic opportunity for revision by convention. Ordinarily, it is to be expected that new constitutions will be adopted following constitutional conventions held pursuant to such provisions, and the function of the convention in such a case and the mechanics of the adopting process would be precisely the same as in the case of amendment to the constitution by a constitutional convention.

Observation: While a state constitution is the basic and supreme law of a state, state constitutions cannot subtract from the rights guaranteed by the Federal Constitution, but they can provide additional rights to their citizens.

12 Generally

The exclusive means by which the Constitution may be amended is found in Article V thereof, the adoption of which reflects both the framers' realization that the Constitution might, in the progress of time and the development of new conditions, require changes, and their intention to provide an orderly manner in which these changes could be accomplished. Article V alone confers the power to amend and determines the manner in which the power can be exercised. Insofar as it speaks on that subject, it is supreme, and any provision of a state constitution in conflict therewith must be held at naught.

Article V insures that deliberation and consideration shall precede any proposed change in the Constitution by specifying that amendments may be proposed by Congress, whenever two-thirds of both houses deem it necessary, or by a constitutional convention called by Congress on the application of the legislatures of two-thirds of the states. The Article further specifies that an amendment becomes effective as part of the Constitution when ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths of the states, "as the one or the other Mode of Ratification may be proposed by the Congress." Thus, it can be seen that the Constitution provides two methods of proposing amendments: by the Congress and by convention as well as two methods of ratifying proposed amendments by the states: by their legislatures and by conventions, but not by referendum or initiative, resolution, or judicial fiat.

Observation: Thus far, all of the 27 amendments that have been ratified have been proposed by the Congress, and all have been ratified by state legislatures, except the Twenty-First Amendment, which was ratified by state conventions. While the procedure for amending the Federal Constitution is restricted, there is no restraint on the kind of amendment that may be offered.

Any question as to whether the amendment procedure stated in Article V has been properly followed is a federal question which necessarily must ultimately be decided by the United States Supreme Court, and state and federal courts are bound by decisions of the Supreme Court as to the validity of amendments to the Constitution.

An amendment to the Federal Constitution which is duly ratified by three-fourths of the states is effective as against all of the states. For example, it was held that there was nothing in the character of the proposed Nineteenth Amendment to the Federal Constitution, extending suffrage to women, which prevented its adoption in the exercise of the power of amendment conferred by the Constitution, even as against a state which refused to ratify it.

13 Proposal of amendments

Amendments to the United States Constitution may be proposed by Congress or by a constitutional convention. In proposing an amendment to the Constitution, Congress is not acting strictly in the exercise of ordinary legislative power, and a congressional resolution proposing an amendment does not require the approval of the President, nor is it affected by a presidential veto.

The U.S. Constitution contains no limit to what Congress can propose in the way of an amendment to the Constitution, except that no state can be stripped of equal suffrage in the Senate without its consent. The Supreme Court has thus remarked that an examination of Article V discloses that it is intended to invest Congress with a wide range of power in proposing amendments. Various amendments have been attacked before the Supreme Court as beyond the power of Congress to propose, but such attacks have always failed. In proposing an amendment, Congress need not include an express declaration that the houses both regard it as essential, since the joint resolution is sufficient to show that the proposed amendment was deemed necessary.

Article V also provides that Congress, on the application of the legislatures of two-thirds of the several states, "shall" call a convention for proposing amendments. The Supreme Court has interpreted "shall" to mean "must," so that the duty of Congress to call such a convention upon demand is properly characterized as both "mandatory" and at the same time "ministerial." But Congress must of necessity decide whether the conditions exist which give rise to this duty, and it must decide whether the applications for a constitutional convention are valid and when a sufficient number of states have petitioned for a convention.

A resolution by a state legislature calling for a national constitutional convention to consider a particular amendment to the Constitution has been held to constitute a sufficient "application" to Congress within the requirement of Article V, without the signature of the governor of the state.

14 Ratification of amendments

The United States Constitution provides for two methods for ratifying constitutional amendments, namely, by the legislatures of three-fourths of the several states or by constitutional conventions in three-fourths of the states. In either case, the Constitution calls for action by deliberate assemblages representative of the people, which action, it is assumed, will voice the will of the people.

Ratification by a state legislature of a proposed amendment to the U.S. Constitution is not an act of legislation within the proper sense of the word; it is only the expression of the assent of the state to a proposed amendment. A state legislature's function in ratifying a proposed amendment is a federal one and transcends any limitations sought to be imposed by the people of the states in the constitutions of those states. Thus, a state constitutional provision that no convention or general assembly of the state shall act upon any amendment of the Constitution of the United States proposed by Congress to the several states unless such convention or general assembly shall have been elected after such amendment is submitted has been held invalid as a limitation upon the general assembly in the exercise of its federally derived power.

When Congress decides that ratification of a proposed amendment is to be done by state legislatures, there may be a question in a number of states whether the lieutenant governor, who often acts as president of the state's upper house, is a member of the legislature with the right to vote on the proposed amendment. The Supreme Court divided equally on this and came to no decision whether a lieutenant governor could vote under such circumstances.

Observation: Whether a state has ratified or rejected an amendment to the Federal Constitution is a political question for Congress to decide, and federal courts will not determine the same. Thus, the question of the efficacy of ratifications by state legislatures, in the light of previous rejections or attempted withdrawals, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress, in the exercise of its control over the promulgation of the amendment.

The U.S. Constitution is silent on how ratifying conventions should be called or constituted, and, since there is also no governing federal statute, these matters are left to the states. In one state, the justices were of the opinion that delegates must be elected from various localities within the state and not at large, and not by a group system or party system by which the voter would indicate his or her choice by a cross mark opposite a given group. In another state it was held to be proper to require that electors should vote for groups of delegates who are pledged to vote at the convention as dictated by a referendum. Also, under one state constitution, submission of the question of convention or no convention to the voters and the election of delegates in case a majority of votes favor a convention would be valid, but the calling of a convention to pass on a proposed amendment without submitting the question of convention or no convention to a vote would be invalid.

15 By referendum

If Congress directs that the ratification of a constitutional amendment proposed by it shall be by state conventions, this confers, by implication, authority on state legislatures to provide for the assembling of such conventions. Provision by a state legislature for a convention to pass upon a proposed amendment to the Federal Constitution is not a legislative act.

Therefore, provisions of state constitutions and statutes requiring a referendum to approve any particular act of the legislature cannot be applied in the process of ratifying or rejecting amendments to the Federal Constitution. In other words, voters of the several states are excluded by the terms of Article V from direct participation in the process of amending the Constitution. Their participation is restricted to voting for delegates to a ratifying convention.

Article V of the Constitution was not changed by the Fourteenth Amendment so as to require ratification of amendments by popular vote. Some of the state courts have, however, taken the position that an act calling a convention to pass upon an amendment to the United States Constitution is subject to a referendum by the voters of the states as provided by their state constitutions. However, a state may not, by initiative or otherwise, compel its legislators to apply for a federal constitutional convention, or to refrain from such action.

Observation: With regard to a proposed amendment to the Federal Constitution which, as provided by Congress and by Article V of the Constitution, is to be ratified by votes of the states' legislatures, Article V does not rule out communication between the members of a state legislature and their constituents by nonbinding referendum. Since each member of the state legislature is free to obtain the views of constituents in the legislative district which he or she represents, there is no constitutional obstacle to a state statute providing for a referendum on the proposed amendment, so long as it is nonbinding and only advisory on the members of the legislature.

16 Time

In the absence of some stipulated requirement that a proposed amendment to the United States Constitution be ratified by the required number of states within a specified period of time, it would seem that a proposed amendment may be ratified at any time until it is withdrawn from the ratification process. The Twenty-Seventh Amendment to the United States Constitution, for instance, was originally proposed in 1789, but did not obtain the required approval of three-fourths of the states until 1992, 203 years later; yet it was declared ratified in that year by the Secretary of State. It seems settled, however, that the proposal of an amendment may be accompanied by a stipulation concerning the time within which it must be ratified to be validly adopted. Thus, Congress, in proposing an amendment to the Federal Constitution, may, keeping within reasonable limits, fix a definite period for ratification by the states. The Eighteenth Amendment, which was proposed in 1917, and all amendments proposed after 1917 have contained seven-year time limits for ratification by the states. With regard to the proposed Equal Rights Amendment, which did not gain the required approval from three-fourths of the states within the time originally set by Congress, it was held that Congress' attempted extension of time for ratification of this proposed amendment was null and void, where the extension resolution was enacted by a simple majority, in violation of the requirement that Congress act by two-thirds of both houses when exercising its Article V powers. A state court once held that an attempted ratification of the Child Labor Amendment by the legislature of that state was ineffective because more than a reasonable time had elapsed since it was proposed by Congress, but this holding is questionable in view of the experience with the Twenty-Seventh Amendment.

Congress, in controlling the promulgation of the adoption of a constitutional amendment, has the final determination of the question whether by lapse of time its proposal of the amendment has lost its vitality prior to the required ratification, and such determination is not subject to review by the courts.

17 Rescission or retraction

Some authorities believe that a state may first ratify and later withdraw its ratification before three-fourths of the states have certified their ratifications to the Archivist of the United States. Ohio and New Jersey, for instance, ratified the Fourteenth Amendment, but later rejected it. However, the Secretary of State at the time, in his or her proclamation on that amendment, said it was deemed a matter of doubt and uncertainty whether the later resolutions of Ohio and New Jersey were not irregular, invalid, and therefore ineffectual for withdrawing the consent of those two states. One state court has suggested that once an action is taken by a state legislature or convention, it is final and cannot be changed subsequently. Another state court has held that where a proposed amendment to the Federal Constitution has been rejected by more than one-fourth of the states, and those rejections have been duly certified to the Secretary of State, the proposed amendment must be viewed as having failed of ratification and a state which rejected the proposed amendment may not thereafter change its position and vote in favor of it, even if it might have changed its position while the amendment was still before the people.

Observation: With respect to the Equal Rights Amendment (ERA), proposed by Congress in 1972 but subsequently withdrawn for failure of ratification, four states voted to rescind or withdraw their previous ratifications.

18 Conclusion of amendatory process; notice and proclamation

Whenever official notice is received at the National Archives and Records Administration that any amendment proposed to the Constitution of the United States has been adopted, according to the provisions of the Constitution, the Ar-

chivist of the United States shall forthwith cause the amendment to be published, with his or her certificate, specifying the states by which the same may have been adopted, and that the same has become valid, to all intents and purposes, as a part of the Constitution of the United States.

Observation: This duty was formerly assigned to the Secretary of State of the United States.The principle that, if a legislative document is authenticated in regular form by the appropriate officials, a court will treat the document as properly adopted is equally applicable to constitutional amendments. Thus, a duly authenticated official notice to the Archivist that a state legislature or a state convention, having the authority to adopt a resolution ratifying a proposed amendment, has done so, is conclusive upon the Archivist and, when certified by his or her proclamation, is conclusive upon the courts. This rule holds true even where the states have adopted slightly different versions of the amendment.

The United States Supreme Court will not interfere with the performance by a state of its duty to notify the Archivist of its ratification, and that once a state has officially forwarded its certificate of ratification to the Archivist of the United States, there is no longer a controversy susceptible of judicial determination. Thus, a private citizen may not maintain a suit in equity to prevent the proclamation and enforcement of a pending and about to be ratified amendment on the ground that it will be void. And, after certification, a state court will not, on certiorari, review the validity of the action of a convention called to consider an amendment, the court taking judicial notice of certification by the Archivist.

19 Generally

Because it is a power inherent in the people, the existence of the power to amend and change state constitutions appears never to have been doubted.

Observation: An amendment is such a change or addition within the lines of the original instrument as will effect an improvement or better carry out the purpose for which the instrument was framed. The word "amendment" is employed to show its relationship to some particular article or some section of a constitution, and it is then used to indicate an addition to, the striking out of, or some change in, that particular section. In some states, a "local amendment" must be differentiated from a "general amendment," since only the latter must be submitted to the entire state in order to be properly ratified.

A constitution cannot be changed by any legislative definition, or other provision, in a mere statute, nor may it be amended by either case law or rules of court, because only the people of the state are vested with the power to amend their constitution, and that power is plenary.

Constitutions may not be amended by violence. Any attempt to revise a constitution or adopt a new one in any manner other than that provided in the existing instrument is almost invariably treated as extraconstitutional and revolutionary.

20 Subject matter and permissible scope of amendments

Only federal limitations operate to restrict the subject matter of changes which may be made in the constitution of a state, where such alterations are made in the prescribed manner. The paramount act in amending a state constitution is the expression of the popular voice of the people, and by the adoption of constitutional amendments the people may establish laws that the legislature is inhibited to enact.

Every part of a state constitution, including the preamble, may be amended, including the provisions authorizing the making of amendments. Further, even a principle that is deeply rooted in the state constitution, can be abrogated by constitutional amendment. Provisions may be repealed, and new articles may be added. A proposed amendment may encompass enough to accomplish its purpose even though it affects other provisions of the constitution to that extent, for otherwise it would not be possible to amend any provision of the constitution if it could not limit, restrict, or modify other provisions of any other article. Permissible amendments cover a wide (if not limitless) range of subjects. For example, there may, by amendment, be inserted in a state constitution self-operating provisions of a legislative nature; an amendment providing that relevant evidence shall not be excluded in any criminal proceeding may be added to a state constitution; a provision consolidating a city and county government and authorizing the people to make and thereafter amend a charter for their government may be passed; a state constitutional exemption from ad valorem taxes for certain utilities operated by municipal corporations may be repealed by constitutional amendment; or the principle of initiative and referendum may be changed.

A constitutional provision that any amendment may be proposed in either branch of the legislative assembly and referred to the people for approval or rejection permits the proposal of amendments withdrawing privileges conferred upon the people by the state bill of rights.

21 Federal limitations

In accordance with the general rule that the validity of a state constitutional provision turns upon its conformity with federal constitutional guarantees, the scope of permissible state constitutional amendments is subject to the limitation that such an amendment may not violate the Federal Constitution or a federal law enacted pursuant to constitutionally granted authority. Thus, the republican form of government guaranteed to the states by Article IV ß 4, of the Federal Constitution cannot be dispensed with or abolished, and a proposed amendment may not violate the First Amendment's guarantee of freedom of speech. An amendment to a state constitution proposing limits on the number of terms that could be served by United States Congressmen or Senators from that state is subject to removal from the ballot by a court as it could not be implemented in a constitutional manner. However, a state constitutional amendment providing that relevant evidence shall not be excluded in any state criminal proceeding does not violate the federal constitutional right to be free from unreasonable searches and seizures where the intent of the electorate is that the amendment be applied to any situation in which its application is constitutionally permissible. Also, the people's fundamental right under the First Amendment to the U.S. Constitution to petition their government would not be violated by a ruling that a proposed amendment to a state constitution could not be placed on the election ballot by use of the initiative procedure, where the state constitution did not permit the popular initiative procedure to be used to effectuate substantive amendments such as the one in question, and so the right which would be taken away by so ruling did not exist.

22 Generally

While several states have had constitutional clauses relating to amendments couched in negative terms, interdicting amendments except in the cases and modes prescribed, others have been permissive, pointing out the modes in which conventions may be called or specific amendments effected without terms of restriction or allusion to other possible modes. Nevertheless, it is settled that amendments to state constitutions are to be made only in the modes pointed out or sanctioned by the instruments themselves; none of the requisite steps may be omitted, notwithstanding that certain steps are less essential than others. Stated differently, the rule is that the constitutional mode of making amendments is mandatory and exclusive, and must be strictly or at least substantially followed. The requirements should be performed with the greatest certainty, efficiency, care, and deliberation; because such requirements and the prohibitions of the constitution were enacted to save the people from the consequences of their impulses, while the provisions for its orderly amendment would enable them to give effect to their deliberately formed opinions. [n37] Indeed, most procedures for changing the constitution have been purposely made cumbersome, in order that the organic law may not be easily remolded to fit situations and sentiments which are relatively transitory and fleeting. However, the courts are slow to declare a constitutional amendment which has been adopted invalid on technical grounds.

Some state constitutions provide for a constitution revision commission to meet at specified intervals to submit proposals to the electorate. Others provide for amendment by constitutional convention or legislative proposals and resolutions. While some courts have found that the existence of one method in a state constitution for changing a constitution does not necessarily preclude all others, other courts have made clear that the method in the constitution for amendment is the only method available.

23 Constitutional conventions; call

Although the voters in a state may be allowed to amend their state constitutions by initiative, an actual revision of the constitution may be accomplished in some states only by convening a constitutional convention and obtaining popular ratification of the revision, or by legislative submission of the revision to the voters. In some states, constitutional conventions may be called on a limited, or emergency basis.

Constitutional conventions are called under some state constitutions by resolution of the legislature followed by a submission of the question to the electorate. Other states do not require that a call be submitted to the people for their ratification or approval. Further, the legislature in some jurisdictions have been found to have the power to call a constitutional convention, even though the constitution does not specifically provide for the calling of a convention by the legislature. A constitution may also require a different vote for the call of a convention than for the adoption of amendments; the wisdom of providing such a difference is a question for the persons drafting the constitution rather than for the court. And no call for a convention is required when the proposed amendments in the state's constitution have been mandated to accord with federal constitutional requirements. Once the question of calling a convention is proposed to the people, the legislature's discretion is at an end, and upon a favorable vote of the people, the subsequent formal call is only a ministerial function or duty of the legislature.

A defect or imperfection in a call for a convention does not invalidate the amendment process.

24 Qualifications and election of delegates

The qualifications for delegates to a state constitutional convention are set out in some state constitutions or statutes. Where the constitution is silent on the matter, the legislature, having plenary power to call a constitutional convention, has the power to prescribe the qualifications for candidates and the manner of electing delegates. The offices of state senator and representative are not incompatible with membership in a constitutional convention, unless made incompatible by some provision under the state's constitution.

The "one person-one vote" or "equal representation for equal numbers of persons" principle has been held applicable to the election of members to a constitutional convention. However, there is contrary authority, based on the view that the only authority of the members of the convention is to propose amendments to be submitted to a vote of the people of the state. The legislature need not provide for partisan participation or the use of political party designation in the election of delegates even though statutory law provides for both with respect to election of state legislators.

25 Powers

A constitutional convention is not a coordinate branch of the government, and exercises no governmental power, but rather is a body raised by law, in aid of the popular desire to discuss and propose amendments which have no governing force so long as they remain propositions. The fundamental difference between the two is that the legislature has the power to take final action -- that is, to make the laws -- whereas the constitutional convention has a more narrowly limited power to propose changes for submission to a vote of the people. Thus, a constitutional convention has no enacting capacity, unless an incidental one of narrow range is implied as necessary for the purpose of preparing questions of revision and submitting them to the people. Delegates to a constitutional convention exercise no part of the state's sovereign power delegated by the people to the three branches of government.

A convention has no inherent, but only delegated, powers; the convention derives its whole authority from the people's vote. The powers of a convention are those stated in the legislative call, and judicial relief is available from actions of a constitutional convention taken beyond its authority. People who, acting under a proper resolution of the legislature, vote in favor of calling a constitutional convention are presumed to ratify the terms of the legislative call, which thereby becomes the basis of the authority delegated to the convention. The delegates or members are not agents of the legislature, but of the people, and just as a principle may limit the authority of an agent, so may the people.

Conventions may either be limited or unlimited; a limited convention may only consider a specified part or parts of the constitution, while an unlimited convention may consider the entire constitution, and may alter, reform, or abolish any part or all of it. The courts seem to agree that the powers of a constitutional convention may be effectively limited by the terms of a statute calling the convention into existence, where the statute has been approved by the people at an election held for that purpose.

The character and extent of a constitution which may be framed by the convention is generally considered as being free from any limitations other than those stated in the Constitution of the United States.

26 Legislative proposals and resolutions

Amendment of specific constitutional provisions, or the addition of specific new provisions, may be accomplished by legislative proposal in some states, usually pursuant to a requirement that such amendments first be proposed by a joint resolution of the state legislature. It is sometimes, though rarely, required that such resolutions be approved by two successive legislatures. However, an act of the legislature cannot, without the specific approval of the state's electorate, amend the state constitution, and a constitutional amendment does not occur by legislative inattention or disregard.

While a proposal to amend a state constitution may have a title, one is not necessary. The legislature can, by a single joint resolution, propose two separate amendments to the state constitution, but allowing primary election voters to veto one of two alternatives for a constitutional amendment violates the intent of constitutional amendment procedures to leave the electorate at large out of the initiation/proposal process for constitutional amendments, and thus constitutes an unlawful referendum and an impermissible delegation of the legislative authority to the electorate. The legislature can also validly recall and reframe a proposal for amendment of the constitution before the specified time for submitting the proposal to the electorate arises.

While there is contrary authority, it is generally declared that, in submitting propositions for the amendment of the constitution, the legislature is not exercising its legislative power or any sovereignty of the people which has been entrusted to it, but is merely acting under a limited power which is conferred upon it by the people and which might with equal propriety have been conferred upon either house, the governor, a special commission, or any other body or tribunal.

Indeed, the proposal of amendments to the constitution is not a power inherent in the legislative department, but must be conferred by a special grant of the constitution; and in the absence of such a provision, the legislature has no capacity thus to initiate amendments. Thus, the power of the legislature to initiate changes in the existing organic law is considered to be a delegated power rather than a plenary one, and must therefore be strictly construed. And constitutional provisions relating to legislative resolutions regarding amendments are, like other constitutional provisions as to amendments, mandatory. Further, the legislature is not authorized to assume the function of a constitutional convention and propose for adoption by the people a revision of the entire constitution under the form of an amendment or submit to their votes a proposition which, if adopted, would, by the very terms in which it is framed, be inoperative.

27 Entries on legislative journals

In some states, the full text of proposed constitutional amendments, together with the vote thereon, must be entered on the journals of each house of the legislature, and a failure to do so may constitute a fatal defect rendering the whole amendment ineffective, notwithstanding its subsequent ratification by the people, although slight irregularities or mere typographical errors will not be fatal. But failure to enter on the journals a resolution proposing a constitutional amendment until after final adjournment of a legislature is a ground for issuance of a permanent injunction to forbid the Secretary of State from advertising the constitutional amendment as proposed to be voted on at the general election.

In some jurisdictions, the proposed amendment must be spread in full upon the journals. In other jurisdictions, a resolution proposing a constitutional amendment need not be set out verbatim in the legislative journals, provided it is fully and clearly identified by its title and each house has the resolution in its actual possession when it is passed. However, the requirements of a state's constitution cannot be said to have been complied with where the proposed amendment entered upon the journals is entirely different from the amendment proposed to be submitted to the people.

28 Need for executive approval

Absent an express constitutional provision to the contrary, a joint resolution of a legislature proposing amendments to a state constitution does not as a rule require the approval of the governor of the state, who is not considered a party to the exercise of the amendment function or process. Although vetoed, such a resolution possesses full force and validity, and the judiciary may issue writs of mandamus where necessary to compel ministerial officers to perform their duties in reference to its publication.

29 Publication

After a proposed amendment has been passed by the legislature, publication of the text of the amendment is usually required to be made throughout the state in one or more newspapers of general circulation in the state. The purpose of such publication requirements is to inform the electorate about the effect and content of the proposed amendment. In the absence of a contrary constitutional provision, the state legislature may amend the publication requirements.

Substantial compliance with the publication requirement, including publication for a substantial part of the prescribed period, is mandatory. However, a failure to make publication during a small portion of the prescribed period or in every county will not necessarily invalidate the amendment. Substance is more important than form in this instance, and the will of the legislature lawfully expressed in proposing an amendment, and the will of the people expressed at the proper time and in the proper manner at the ballot box in ratifying such amendment, ought not to be lightly disregarded and set at naught, even if an executive or ministerial officer should not strictly comply with his or her duty in connection with matters of detail regarding the publication. An act of the legislature containing a provision relating to publication of a proposed constitutional amendment, in addition to a constitutional requirement, will be treated as directory only with respect to such provision.

A constitutional provision requiring publication by the secretary of state of amendments proposed by the legislature has been held not to apply where an entirely new constitution is being considered by a constitutional convention.

30 Petitions and initiatives by the people

In most states, constitutional amendments may be proposed by initiative and referendum, and the requirements governing the passage of statutes by initiative and referendum must be followed in making changes in the state constitution. Some constitutions, although allowing amendments to be initiated, do not allow constitutional revisions to be initiated. It has also been held that state constitutions cannot be amended through the initiative and referendum process, on the theory that amendment of a constitution is not a legislative act and is not within the initiative power reserved to the people.

The fact that a constitution bars the use of initiative or referendum in connection with legislation on a particular subject does not prevent the public from proposing by initiative a constitutional amendment allowing such legislation. But the

constitution cannot be amended by an initiative act which is legislative in its character, even though it is denominated a constitutional amendment. Nor does the initiative give the people power to adopt an amendment which would violate the Federal Constitution.

The legislature may not enact a statute conflicting with an initiated amendment to the state's constitution, and while the legislature is authorized to establish procedures for determining the validity and sufficiency of a petition to amend the state constitution, that procedure cannot unnecessarily restrict the initiative privilege.

With regard to petitions and elections, numerous cases have come before the courts of those states in which amendment of a constitution by initiative is authorized, with regard to the sufficiency or validity of particular petitions in such respects as form and contents, subject matter, the submission of conflicting measures, the manner and places where potential petition signers may be solicited, the joinder and submission of multiple amendments in a single petition, the number, identity, and qualifications of signers and petition circulators, or the genuineness and authentication of signatures, the right of petition signers to later withdraw their signatures, and the like. Similarly, there are cases dealing with questions relating to the conduct of the election on an initiative petition. In general, the procedures applicable to initiatives and referenda generally are equally applicable to petitions involving the proposal of constitutional amendments, and the constitutional and statutory requirements for a voter-initiated referendum must be strictly complied with, although substantial compliance is usually permissible in the initiative context.

31 Submission to vote of the people

Amendment of a state constitution is effectuated, ultimately, by the vote of the people. Approval by a vote of the people is required if a proposed constitutional amendment, whether traceable to legislative action, or to a constitutional convention, or to initiative by the people, is to become effective through adoption, and such right of the people to vote exists unless there has been a total failure to comply with the requirements of the state's constitution in proposing the amendment. Ordinarily, each constitutional provision which is being directly amended by an initiative measure must be separately submitted to the voters. Submission to the electorate may be either at a special or a general election. A requirement as to the kind of election at which a constitutional amendment proposed by the legislature must be submitted does not apply to a constitutional amendment proposed by initiative.

Where the method by which proposed constitutional amendments are submitted to the people for their approval or disapproval is specified in the provisions of the state constitution which are concerned with the amendatory process, the provisions, together with other provisions regarding constitutional amendments, are mandatory. Thus, provisions as to the time of submission must be strictly complied with. Where the proposed amendment relates to the article governing amendment of the state constitution, the question whether the proposed amendment was properly submitted to the voters must be determined under the constitution as it existed prior to the election.

Where a proposed amendment affects a particular locality only, a state constitution may require submission only to the people of the "political subdivision" directly affected; a school district may constitute such a political subdivision, but the unincorporated area of a county may not. Where a constitution is silent as to the manner of submitting a proposed amendment to the electors, it has been held that the method is subject to legislative control.

A ballot cast by means of a voting machine is a "written ballot" within the meaning of a constitutional provision that each constitutional amendment shall be submitted by written ballot; and the use of voting machines for the purpose of balloting on proposed constitutional amendments constitutes the employment of "substitute ballots" as permitted by a statute providing for the use of substitute ballots in lieu of official ballots; the fact that a ballot in a voting machine differs from the official ballot in color and size of type is not a fatal difference.

Upon rejection of a constitutional amendment by the electorate, the constitution remains unchanged as to that particular issue. Constitutional initiatives, once approved or defeated at a regular statewide election, cannot be resubmitted to the electorate at the next regular statewide election, where procedural defects of constitutional proportion caused the first election results thereon to be voided.

32 Validity of amendments; ballots, titles, and explanatory material

The complete text, or all details, of a proposed amendment need not be set out in a ballot for the approval of a constitutional amendment to be valid; only so much should be printed as may be necessary to indicate clearly the nature and purpose of the amendment and to permit the voters to cast an intelligent and informed ballot.

In submitting a proposed constitutional amendment to the voters, care must be taken by those drafting the title and summary to see that they reflect in clear, impartial, and accurate language the scope and import of the changes which the amendment would make in the existing law, because the majority of voters, when called upon to vote for or against a proposed measure at a general election, will derive their information about its contents from inspection of the ballot title immediately before exercising their right of suffrage; that is the purpose of a ballot title. The length of a ballot title does not, in itself, render a ballot title insufficient to allow a voter to reach an intelligent and informed decision for or against a proposal. However, in many states, there is a limit on the number of words that can be placed on the ballot to explain the purpose of a proposed amendment, and in others the ballot title must be written so as to be understood by citizens who have a certain reading comprehension level.

Under some state statutes, the attorney general must devise the form of the question to be presented to the voters. In other states, the secretary of state or a board or committee is responsible for drafting the ballot language.

The courts have often been called upon to review the sufficiency or accuracy of ballot titles or summaries, holding them sufficiently clear, and impartial and not misleading in some cases, and inadequate or insufficient, unintelligible, or even misleading in others. But only in a clear case will the courts hold a title to be invalid, and the burden for invalidating an amendment on the ground of an inadequate or misleading title is heavy.

It has been said that the expense and inconvenience of holding an election on a proposal is sufficiently burdensome to justify requiring that objections to ballot titles be made before the election, unless the challengers can prove that so many voters were actually misled that the result of the election might have been different. The fact that a better title could be written is not sufficient to hold that the title actually used is invalid, nor are the courts concerned with the wisdom or merit of a particular measure, in determining the sufficiency of a ballot title.

Use of a popular name of a particular proposed amendment has been considered a useful device, provided that it is not misleading or partisan. But the use of words which would tend to color the merit of a proposal one way or the other, and catch phrases which could form the basis for a slogan for use in a campaign for or against the proposal, should be avoided. Nevertheless, a ballot title may be required by statute to summarize the major effect of a proposal,

The desirability of an informed electorate in passing on changes in the fundamental law of the constitution is disputed by no one, and the practice of informing the voters of the nature of constitutional amendments has been given high priority in judicial decisions. Thus, publication of a "Voter's Guide" may be a reasonable incident of submission of proposed amendments to the voters. Some states, by statute, make express provision for the dissemination of information regarding proposed amendments. However, the availability of public information about a proposed constitutional amendment cannot be a substitute for an accurate and informative ballot summary.

33 Simultaneous, successive, or conflicting proposals

Where a constitutional amendment conflicts with pre-existing constitutional provisions, the last amendment must prevail, since it is the latest expression of the people's will, and because the drafters of a constitutional amendment are presumed to know about existing laws and constitutional provisions, and to have drafted their provision accordingly. However, the problem of conflicting provisions resulting from the adoption of an initiative proposal cannot always be satisfactorily addressed by the application of the principle of constitutional construction that the most recent amendment necessarily supersedes any existing provisions which are in conflict; furthermore, the rule is often applied that ordinarily a state constitution may not be amended by implication except where the language adopted by the voters in approving a new amendment is in clear conflict with existing constitutional provisions. In addition, there is a strong presumption against the implied repeal of a statute or constitutional provision by a subsequent enactment.

State constitutions sometimes make express provision to resolve the problem which exists when two constitutional amendments relating to the same subject are coincidentally submitted to the people for approval. Also, sometimes statutes providing that in case of a conflict in initiative or referendum measures the one receiving the greatest number of affirmative votes shall prevail apply when two constitutional amendments adopted simultaneously are in material, direct conflict.

34 Amendments embracing more than one subject

An indication of the acknowledged seriousness of the matter of making changes in the fundamental law is the requirement, established by the constitutions of several states, that when more than one amendment is submitted to the electorate at the same election, such amendments must be so submitted as to enable the electors to vote on each separately,

and that each amendment must consist of only one subject. Such a "single subject" constitutional requirement is mandatory. Its purpose is to prevent an imposition upon or deceit of the public, to afford voters freedom of choice, and to prevent "logrolling,"[n1] hodge-podge legislation, or "jockeying" -- that is, to prevent voters from being required to vote for something of which they disapprove in order to register approval of other propositions tied up therewith. The "single-subject" requirement is also a rule of restraint designed to insulate the state's organic law from precipitous and cataclysmic change.

A proposed measure violates the "single-subject requirement" for constitutional ballot initiatives if its text relates to more than one subject and has at least two distinct and separate purposes which are not dependent upon or connected with each other, but this requirement is not violated if the ballot initiative only effects one general object or purpose. Indeed, a proposal consists of one amendment to the constitution only so long as each of its subjects bears some reasonable relationship to a single general object or purpose, and the rule has been laid down that a constitutional amendment which embraces several subjects, all of which are germane to the general subject of the amendment, will, under such a requirement, be upheld as valid and may be submitted to the people as a single proposition, even if more than one article of the state constitution is affected by the amendment. Whether particular proposals can be combined necessarily requires a judgment both as to the relationship between them and as to their relative importance, and the courts have found a single general subject in some cases but not in others. Courts are, however, reluctant to overturn a legislative determination that a proposed amendment involves only one general object or purpose. Also, where an amendment to the constitution relates to a single purpose or object and all else contained therein is incidental and reasonably necessary to effectuate the purpose of the amendment, such an amendment does not violate the constitution, and the fact that the proposed amendment may affect other provisions of the constitution does not necessarily create an amendment with more than one purpose or object within the meaning of the constitution. However, where separate provisions of a constitutional amendment proposed by an initiative are an aggregation of dissimilar provisions designed to attract the support of diverse groups to assure its passage, the defect of multiple subjects is not cured by either application of an overbroad subject title or by virtue of being self-contained.

A state constitutional requirement of separate presentation of each proposed constitutional amendment where there is more than one does not make it necessary that every alteration or amendment of any phrase, clause, or provision of the constitution must be submitted for a popular vote as a separate provision.

Restrictions as to the number of subjects which may be embraced by a single constitutional amendment do not exist in all states, and where this is true one amendment may cover more than one subject. In this connection, it is to be noted that constitutional prohibitions to the effect that a statute shall embrace but a single subject and similar constitutional restrictions relating to the title and subject matter of statutes have no application to acts of the legislature proposing an amendment to the constitution. It has been held that the same liberal rules of construction are to be applied to the titles of constitutional amendments as have been applied to statutes under the constitutional provision limiting the titles of statutes generally to one subject.

A series of amendments submitted to the voters under the "daisy chain" system, under which all amendments must be accepted or all will be rejected, has been held to constitute an attempted revision of the state's constitution, rather than an amendment of it, and could not be accomplished under the amendment procedure specified in the constitution.
35 "One person-one vote" principle; number and count of votes
A constitutional requirement of a two-thirds favorable vote in every county with respect to a proposed amendment, when there is a wide disparity in population among the counties, must result in greatly disproportionate values to votes in the different counties, and therefore does not meet the "one person-one vote" concept. Some courts see no rational basis to distinguish between voting on representatives in the legislature, and voting on constitutional amendments, since one is no more a necessary ingredient of our democratic process than the other; nor can it be said that an equal voice in selection of the legislature is of greater importance to a citizen than equality of weight in expression of views on changes in the basic charter, that is, the constitution.

With reference to the number of votes which must be cast to ratify proposed amendments, there is a wide diversity, not only of the constitutional provisions controlling the question, but also of the interpretations given to these provisions by the courts. In some states the requirement for ratification is a majority of the electors voting on the amendments in question. In the states having such a provision, it has been held that a simple majority as to each amendment is adequate without reference to the number of votes cast on other propositions at the same election. In other states, a similar provi-

sion has been held to require a majority of all the voters voting at the election at which the proposed amendment is submitted, and a mere majority of those voting on the amendment itself has been deemed insufficient. Elsewhere, a "majority of the votes cast" or "majority of the electors voting" has been held to mean only a majority of the votes cast on the particular proposition, not the majority of the highest vote for any purpose to which the election pertained, and without reference to, or inclusion of, those electors who failed to express any opinion by a vote on the issue. Blank, unintelligible, fouled, void, or illegal ballots are not counted.

While a proposed constitutional amendment becomes a part of the constitution if adopted by the vote of the people, it cannot take effect and become operative until the final tabulation and determination in accordance with the state's election law.

36 Judicial intervention in, or supervision of, amendment proceedings

It is the duty of the courts to enforce affirmatively the provisions of an existing constitution with reference to matters connected with proposed changes in the constitution, since the citizens of the state are entitled to have their constitution remain unaltered until such time as there are appropriate proceedings to bring about a change in strict conformity to the essential requirements specified in the constitution itself. A part of the courts' duty and responsibility in this regard consists of ensuring that when voters exercise their right to change a constitutional provision through the initiative process, they are allowed to make an intelligent choice, fully aware of the consequences of their vote. Similarly, a court has the duty and responsibility entails seeing that the individual voter has available a sufficient ballot title when deciding to accept or reject an amendment. A state court may therefore intervene and simply modify the wording of a ballot question which fails as written to inform the voters as to its nature and effect, if such correction will eliminate the infirmity. However, a state court should not disapprove a certified ballot title for a constitutional amendment which substantially complies with the statutory standards merely because the court does not believe it to be the "best of all possible titles."

The court also has a duty to compel the submission of duly proposed amendments, and to determine whether the proper authorities have complied with their duty to provide to the voters an impartial analysis of an initiative proposal to amend the state constitution. The power of a court to intervene in amendment proceedings is not, however, without limits.

Some courts have refused to intervene to enjoin the submission of constitutional amendments to the electorate on the ground that the proposed action, if adopted, would be substantively unconstitutional, sometimes based upon a supposed lack of "jurisdiction" or "power."

Observation: A court's determination as to whether a proposed referendum for a constitutional amendment meets the requirements to be considered by the citizenry should not be construed as either favoring or opposing passage of the amendment.

37 Validity of amendments

A state supreme court has authority to conduct a post-election review to determine whether a proposed constitutional amendment is constitutional or not, and courts have exercised the authority to determine the validity of proposals, submissions, or ratifications of changes in the organic law. The question of the validity of the adoption of an amendment to the constitution is a judicial and not a political question. In reaching a decision, the legislative history and historical background of an amendment can be of assistance should there be an ambiguity in the constitutional language which the court may be called upon to resolve or interpret.

In conducting its review of the people's amendment to their constitution, a reviewing court should make no attempt to judge the wisdom or the desirability of enacting the amendment. Furthermore, the fact that a new amendment may conflict with existing articles or sections of a state constitution can afford no logical basis for invalidating the new amendment.

38 Presumption of validity; effect of partial invalidity

After ratification by the people, every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to a state constitution, and unless the courts are satisfied that the constitution has been violated in the submission of a proposed amendment, they should uphold it. The view has been taken that substance is more important than form, and that the will of the legislature lawfully expressed in proposing an amendment and the will of the people expressed at the proper time and in the proper manner in ratifying such amendment ought not to be lightly disregarded. It is not to be essential to the validity of an amendment which in effect modifies a constitutional limitation that the limitation be first changed, since the amendment itself works the change.

Practice guide: The burden of proof in legal challenges to initiative matters is upon the person or persons attacking the validity of a petition or initiative.

In accordance with the rules governing the invalidity of portions of a statute, it has been held that where part of an amendment to a state constitution is invalid because it violates the constitution, if the several parts of the amendment are separable, the valid portions may be saved, unless it is obvious that the intent of the adopters of the amendment was to accept one general scheme in its entirety, in which event, if part of the amendment falls, the whole must fall with it. The factors that are used to determine whether ballot initiative provisions are severable or not are whether the invalid provision is essential to the efficacy of the amendment as a whole, whether it is a provision without which the amendment would be incomplete and unworkable, and whether the provision is one without which the voters would not have adopted the amendment.

39 Scope of review; technical or minor defects

The courts have the right to consider whether the legislative department and its agencies have observed constitutional requirements in attempting to amend the constitution, and may set aside their acts in case they have not done so. Substance rather than form is to be regarded in considering whether the system prescribed by the constitution for submitting proposals to amend it has been observed. Whether an amendment to a state constitution has been validly proposed and adopted by the electorate depends upon whether substantial compliance or noncompliance with the mandatory provisions of the constitution relative to such matter has been achieved. Neither the legislature nor the people can short-circuit the constitution in the adoption of amendments.

Judicial concern is directed and limited to whether the fundamental law has been complied with and whether the amendment has received the sanction of the popular approval in the prescribed manner. For the courts of a state to go farther and assume jurisdiction to set aside and declare void an amendment of the constitution adopted by the people and so declared by the governor would be an invasion and usurpation by the judiciary of the legislative functions of the people. The adoption of a constitutional amendment by electors constitutes the exercise of a sacred American right, and a court will not invalidate the amendatory language except under the most extreme circumstances.

It has been said that, in considering a constitutional amendment after its adoption by the voters, the question for the court is not whether it is possible to condemn the amendment, but whether it is possible to uphold it, and it should be sustained unless it plainly and palpably appears to be invalid. All that is required is that the amendment, if adopted, may conceivably be valid in some respect or under some conditions. The burden for invalidating an amendment after adoption is heavy. That part of the amendment may be questionable, ambiguous, or inoperative is of no importance.

Although the procedure outlined in a state's constitution for the adoption of a constitutional amendment is mandatory and must be followed, the courts are reluctant to declare a constitutional amendment which has been adopted by the people invalid on technical grounds. Thus, an amendment will become a valid part of the constitution even though some technical form of procedure has been omitted or some minor irregularity committed where such amendment has been adopted by the electorate, the favorable vote of the electorate having the effect of curing defects in form. The test for determining whether technical defects will invalidate an otherwise valid amendment is whether the cumulative effect of the technical defects is harmless or fatal to the ballot or amendment.

40 Constitutions as grant or limitation of power

The Constitution of the United States of America creates a Federal Government of limited, delegated, and enumerated powers which are bestowed only in specific grants. The powers delegated by the Federal Constitution to the national government are few and defined, while those which remain in the state governments are numerous and indefinite, and it is universally recognized that the Federal Government can exercise only those powers specifically granted to it. Because the powers given to Congress are defined in the Federal Constitution, Congress can and must act pursuant only to those powers in enacting legislation.

State constitutions, on the other hand, are not generally regarded as grants of power, but instead are viewed as limitations on the otherwise plenary power of the people of each state to do as they will. State constitutions are not only viewed as limitations on the legislative power, but also on the executive and judicial powers. A state constitution is also frequently viewed as a delegation of the people's political powers. Thus, while an act of Congress is invalid unless the Federal Constitution expressly authorizes it, a state legislature may enact any law which is not prohibited by the state or federal constitutions. All power which is not limited by the constitution inheres in the people.

41 Territorial application; United States Constitution

The United States Supreme Court has stated that the Constitution, in its operation, is coextensive with the political jurisdiction of the United States. Thus, the Federal Constitution not only restrains the power of the Federal Government to act in this country, but also the government's power to affect American citizens in foreign countries. It has no extraterritorial effect except with respect to American citizens, unless the foreign country has agreed to permit United States laws to be imposed therein, an exception being made for conduct on stateless vessels on the high seas.

The fundamental guarantees of life, liberty, and property, made by the Federal Constitution, such as those relating to the writ of habeas corpus, bills of attainder, ex post facto laws, and trial by jury for crimes, have no relation to crimes committed outside the jurisdiction of the United States against the laws of a foreign country, nor will the Supreme Court inquire into the legality of acts committed by a foreign nation or government within its own territory, even if those acts would otherwise violate the Federal Constitution if committed in the United States. An American citizen who commits a crime in a foreign country cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode is provided for by treaty stipulations between that country and the United States.

For purposes of defamation suits brought in United States courts, First Amendment protections do not apply to all extraterritorial publications in foreign nations by persons under the protection of the United States Constitution. The Fourth Amendment does not apply to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country, nor does it ordinarily apply to evidence obtained through a search conducted by an official of a foreign government in a foreign country. And the Fifth Amendment's right against self-incrimination is not violated by statements offered in United States courts and obtained by law enforcement officers of a foreign country who do not follow the requisites of the Miranda decision since the exclusionary rule is inapplicable to interrogations performed by foreign law enforcement officers.

42 State constitutions

The organic law embodied within each state constitution runs with the territorial jurisdiction of the state. Like a state statute, a state constitution can operate only within the territorial jurisdiction of a state, except as it may be given extraterritorial effect not of its own force but through the doctrine of comity or the full faith and credit provision of the United States Constitution. Thus, state constitutions are to be construed and considered as relating to people and institutions within the state, that is, their application is intraterritorial and not extraterritorial.

43 United States Constitution and amendments

The Constitution of the United States did not take effect at once on its being ratified by the necessary number of conventions in nine states, the approval of which was made a requisite to its validity. By the instrument itself, it was provided that the ratifications by the states were to be reported to the Congress, whose continuing existence was recognized by the convention. The new government did not actually commence until the old government in fact expired.

With regard to constitutional amendments, the moment an amendment to the Federal Constitution is ratified by three-fourths of the state legislatures (or three-fourths of the state constitutional conventions called for such purpose) and the Archivist of the United States so certifies and proclaims that the amendment has become a valid part of the Constitution, it becomes effective as law, even if the acts against which it is directed are prohibited only after the expiration of some additional period of time after its ratification.

44 State constitutions

Where an existing state constitution provides that proposed amendments, if ratified by the requisite majority, is to become part of the constitution, such amendments, in the absence of any contrary provision, take effect from the time of their actual ratification or certification unless a postponement of the effective date of a proposed constitutional amendment is submitted to the voters and adopted by them, or unless the terms of a given amendment either explicitly or implicitly provide for a different effective date. In some instances, a right given by a state constitutional provision or amendment may depend for its effectiveness on subsequently prescribed or enacted procedures or rules, in which case the right may not become immediately effective.

45 On existing constitutional provisions

A new constitution is rarely intended to supplant the entire body of statutory law. It only alters in some respects the fundamental laws of a state, and where constitutional provisions are reenacted in the same words, it is a reasonable presumption that the purpose was not to change the law in such particulars, but to continue it in uninterrupted operation. The same rule of continuity applies to amendments to the constitution, as an amendment is equal in dignity to an original provision of the constitution, and upon adoption, becomes a part of the constitution as much as if it had been originally incorporated therein.

The effect of an amendment to a constitution is to repeal or modify some existing constitutional provision, or to add something new to the instrument. An amendment repeals or displaces a prior constitutional provision insofar as it expressly abrogates, or is irreconcilably in conflict with, the former provision. Constitutional amendments, if possible, should be harmonized with other provisions of the constitution, and effect given to the whole instrument and to every section and clause wherever possible, but where a new amendment is irreconcilably in conflict with a part of the constitution adopted earlier, the new amendment prevails and supersedes it. This may be the result even where a constitutional amendment is not self-executing, if it is clear that it was the intention of the people in adopting it that it would repeal the prior constitutional provision.

46 Prospective or retrospective effect

The presumption that statutory enactments are not to be considered retrospective in their operation unless the intention to make them so is clearly apparent from their terms has application as well to constitutional provisions. Thus, the general rule is that prospective effect alone is given to provisions of state constitutions. Indeed, retroactive application of laws is highly disfavored; therefore, unless the terms or language of an amendment clearly show an intent to make the amendment retrospective in operation, it is presumed that a constitutional amendment will be given only prospective application. This is so, even though the amendment essentially reenacts a statute previously declared unconstitutional.

The ultimate determinative factor is, however, the intent of the framers, which must be evident beyond reasonable question in the case of claimed retrospective operation.

A constitutional amendment will not be given retroactive effect where its wording positively and definitely indicates that it was intended to operate prospectively only. On the other hand, a constitutional provision will not be held to operate prospectively only, where to do so would conflict with the clear language of the provision.

The rule that where a statutory amendment is remedial, it may apply retrospectively when it relates to practice, procedure, or remedies only and does not affect substantive or vested rights, applies equally to the interpretation of a constitutional amendment. Thus, a constitutional provision relating to procedural matters such as appeals governs the right to appeal even though the cause arose prior to the adoption of the provision.

47 Repeal by implication

Implied repeal is not favored, and is applicable only when the provisions of a state constitution and a subsequently adopted amendment thereto are positively and irreconcilably in conflict with each other, and then only to the extent of the conflict. While an amendment to a constitution and existing constitutional provisions should be construed so as to harmonize with each other, where this is not possible, and they cannot be so construed as to have both provisions stand and leave to each a legitimate office, the amendment, being the latest expression of the will of the people, prevails. In this respect, distinct provisions of the constitution are repugnant to each other only when they relate to the same subject, are adopted for the same purpose, and cannot be enforced without material and substantial conflict.

48 On existing statutes

When a new constitution is established, it is customary to insert a provision, commonly known as a savings clause, that all statutes in force and not inconsistent with the new constitution shall continue until amended or repealed by the legislature, although it is generally recognized that such laws remain in force without an express provision to that effect. Thus, a statute in force when a constitutional amendment is adopted ordinarily is not affected by it and continues in force subsequent to the adoption and effective date of the amendment, especially where the amendment is merely a reaffirmation or ratification of an existing statute, unless the amendment contains some provision which expressly abrogates pre-existing rights, or unless the new constitution or the new amendment is clearly and irreconcilably in conflict with the statute.

Whereever such a construction is possible, a new constitutional amendment must be held to amend existing statutory law to agree with such amendment, and those parts of a statute which do not conflict with a constitutional provision retain their validity. However, a constitutional amendment which changes prior statutory procedure is superior to a legislative act and, in effect, repeals it. Those statutes which are consistent with the new constitutional amendment and which were enacted before it was passed are just as operative and effective as those enacted subsequent to the adoption of the new constitutional provision. However, a law which is on the statute books, but which has been rendered ineffective by judicial construction of a constitutional amendment, is not "in force" within the meaning of a saving clause in a subsequent amendment, and it is also usually held that a constitutional amendment will not act to validate existing statutes or other enactments which were invalid prior to its adoption.

49 Repeal by implication

It is the general rule that a statute existing at the time of adoption of a state constitution remains in force and effect and is not repealed by the enactment of a new constitution whose provisions are not inconsistent with the statute, although the adoption of a new constitution may not automatically validate all statutes enacted under the former constitution regardless of their legality or illegality under the earlier constitution. If there is a conflict between a statute and a new constitutional provision, the former must give way, since all statutes which are actually inconsistent with a new constitution are repealed by implication, unless they constitute contracts within the meaning of the federal provision prohibiting an impairment of the obligation of contracts. Similarly, an amendment of the constitution must be held to amend the existing statute law to agree with such an amendment.

Implied repeals of statutes by later constitutional provisions are not favored any more than in the case of an implied repeal of one statute by another. To effect a repeal by implication, the inconsistency between existing legislation and a new constitutional provision must be irreconcilable; that is, the inconsistency must be obvious, clear, and strong. Such a statute cannot be upheld if it is opposed to the plain terms of the new constitution. Otherwise, the statute will be deemed to be still in force and effect. In making the determination whether there is a conflict between a pre-existing statute and a new constitutional provision so that the statute is repealed by implication, a court will presume in favor of the constitutionality of the statute until the contrary clearly appears and will, if possible, construe a statute so as to render it valid. The repeal must be plain and unambiguous.

Generally speaking, an existing statute is not automatically repealed by implication on adoption of a new constitutional provision if, under the new provision, the legislature could validly enact the same statute. Nonetheless, an amendment does operate to negate, supersede, or modify statutory provisions relating to the same subject matter if the statutory provisions are repugnant to, or inconsistent with, the controlling organic provisions contained in the amendment.

A statute, valid when enacted, is not automatically repealed by implication with the adoption of a nonself-executing constitutional amendment on the same subject. However, where a new constitutional provision is self-executing, an implied repeal of an existing statute has been said to necessarily annuls all inconsistent acts of the legislature passed prior to its adoption.

The rule that a statute, unconstitutional when it takes effect, is not resurrected by a subsequent constitutional change is not applicable to a statute which was passed in anticipation of an already approved constitutional change and which was of no force or effect until after the new change took effect.

50 Effect of new constitution or amendment on common law

Common-law rights, whether existing at law or in equity, may be superseded or abrogated by a state in its constitution. But the framers of a constitution are presumed to have intended no change or innovation in the common law further than what appears from the express declarations or reasonable implications; the common law is repealed by such constitution to the extent that it is inconsistent therewith and only to that extent. Jural rights which were so well established prior to the adoption of a constitution are preserved by the constitution and may not be abolished by the legislature.

51 United States Constitution and amendments thereto

The Constitution of the United States and any amendments thereto, together with federal laws made in pursuance thereof and treaties made under the authority of the United States, are expressly declared to be the supreme law of the land in the Constitution itself. The Constitution as the supreme law is without qualification and is absolute: while the national government is one of limited powers, those actually granted constitute the paramount authority of the land. The Federal Constitution is binding on all officers and departments of both the federal and state governments, including every court, whether it derives its authority from a state or from the United States.

No state law or public policy of a state can be allowed to override the positive guarantees of the Federal Constitution. On the other hand, powers granted to the Federal Government in the Constitution cannot be exercised in such a way as to have the practical effect of nullifying important state powers expressly reserved to the states in the Constitution, and the supremacy clause only operates to the extent that there is an actual conflict between state and federal laws.

All courts, federal and state alike, take judicial notice of the provisions of the United States Constitution.

Since any constitutional amendment, upon adoption, becomes a part of the Constitution as much as if it had been originally incorporated therein, so that it is equal in dignity to an original provision of the Constitution, it necessarily follows

that amendments to the United States Constitution are part of the supreme law of the land. All states are bound by such amendments, including states which refused to ratify them, at least to the extent that they are made applicable to the states by the Fourteenth Amendment.

A state law, even if passed in the exercise of the state's acknowledged powers, must yield, in case of conflict, to the supremacy of the Federal Constitution. Indeed, even state constitutions cannot subtract from the rights guaranteed by the Federal Constitution, but they can provide additional rights to their citizens, as the Federal Constitution sets a floor for individual rights, while state constitutions establish a ceiling. Therefore, a state constitution is of no effect where it is in conflict with the Constitution of the United States, and provisions in state constitutions have often been held void as inconsistent with federal constitutional provisions. However, a federal court will defer to a state court's interpretation of its own state constitution.

52 Effect of emergency

No emergency justifies the violation of any of the provisions of the United States Constitution. An emergency, however, while it cannot create power, increase granted power, or remove or diminish the restrictions imposed upon the power granted or reserved, may allow the exercise of power already in existence, but not exercised except during an emergency.

The circumstances in which the executive branch may exercise extraordinary powers under the Constitution are very narrow. The danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. For example, there is no basis in the Constitution for the seizure of steel mills during a wartime labor dispute, despite the President's claim that the war effort would be crippled if the mills were shut down.

Observation: The Supreme Court has not denied the reality of dangers from foreign or internal conflicts. Rather, it has recognized the need to respect constitutional requirements even in troubled times. Security interests may be affected by fluctuations in international trade and the supply of natural resources, by social unrest at home and abroad, and by public disclosure of policy deliberations; but such events cannot routinely justify invasions of privacy or restrictions on expression without devaluing and eventually destroying those rights. Nonetheless, the Court has recognized that authority of an emergency nature to protect national security information is vested in the President as head of the executive branch and as Commander in Chief.

53 Federal laws

The Federal Constitution provides that the laws of the United States made in pursuance thereof shall be the supreme law of the land, anything in the constitution or laws of any state to the contrary notwithstanding. Therefore, an act of Congress, constitutionally passed within the limits of its authority, becomes a part of the supreme law of the land. Hence, a state law is void if it is contrary to a valid act of Congress, since Congress clearly has the power to pre-empt state laws.

Federal statutes operate essentially as a part of the law of each state, and are as binding on its authorities and people as are its own local constitution and laws in the same manner as if they were actually embodied in the Federal Constitution, and are controlling over state constitutional or statutory provisions. State policies or regulations and orders of state administrative agencies may not prevail where they conflict with valid enactments of Congress. Thus, state laws are always subordinate, and federal laws, enacted pursuant to the Constitution, are always paramount.

The critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law. In a preemption case, a state law should be displaced only to the extent that it actually conflicts with a federal law, and a federal court should not extend its invalidation of a state statute any further than necessary to dispose of the case before it. Therefore, consideration of the continuing validity of a state statute under the supremacy clause starts with the basic assumption that Congress did not intend to displace the state law. A federal statute implicitly overrides a state law either when the scope of the statute indicates that Congress intended the federal law to occupy the field exclusively, or when the state law is in actual conflict with the federal law; but the exercise of federal jurisdiction in a particular area does not automatically result in displacing state laws that may relate to, but are not in conflict with, federal laws. Nevertheless, an "implied conflict" preemption may exist where it is impossible for a private party to comply with both the state and federal requirements, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Under the supremacy clause, the criteria for determining whether a state law has been pre-empted by an act of Congress therefore are whether:

.Congress, in enacting a federal statute, expressed a clear intent to pre-empt state law;

.There is an outright or actual conflict between the federal and state law;

.Compliance with both federal and state law is in effect physically impossible;

.There is implicit in the federal law a barrier to state regulation;

.Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; or

.The state law stands as an obstacle to the accomplishment and execution of the full objectives of the Congress.

The supremacy of federal law is binding on state judicial officers and courts.

Observation: All courts, federal and state alike, take judicial notice of the public and general acts of Congress.

Practice guide: When attempting to determine whether a federal statute pre-empts a state statute, the question an attorney or court should ask, which is basically a question of congressional intent, is whether Congress, in enacting the federal statute, intended to exercise its constitutionally delegated authority to set aside the laws of a state; if so, the supremacy clause requires the court to follow federal, not state, law. If explicit preemption language does not appear in the federal statute or does not directly answer the question whether Congress intended to exercise its authority to set aside state law, then a court that is determining whether the federal law pre-empts the state law must consider whether the federal statute's structure and purpose, or nonspecific statutory language, reveal clear, but implicit, pre-emptive intent.

54 Federal administrative rules, regulations, and determinations

Wherever possible, state and federal powers should each be exercised so as not to interfere with the other, but if they do conflict, the federal laws and regulations, being the supreme law of the land, prevail over state laws and regulations. Accordingly, in case of a conflict between the regulations and orders of a state commission on a subject properly within the jurisdiction of a federal agency or commission, which has acted on the subject by issuing its own regulations or orders, the former must yield to the latter, since the term "laws of the United States," as used in the supremacy clause, encompasses both federal statutes and statutorily authorized federal agency regulations. A ruling of a federal agency that it has jurisdiction in a particular matter may thus preclude a state agency from taking jurisdiction, and state courts are bound by the lawfully authorized acts of the federal agency.

Where state and federal authorities have concurrent powers, orders and regulations of state administrative agencies may operate so long as Congress has not pre-empted the field by its own enactments and where the state regulations are not at variance with the federal regulations; but where the United States exercises its power of legislation so as to conflict with a regulation of the state, either specifically or by implication, the state legislation becomes inoperative and the federal legislation exclusive in its application.

State statutes, as well as municipal ordinances, may be rendered inoperable and unenforceable, suspended, or pre-empted to the extent to which they conflict with valid regulations or orders of federal administrative agencies. However, it should never be presumed that Congress intends to supersede or suspend the exercise of the reserved powers of the state, even where that may be done, and except so far as its purpose to do so is clearly manifested in the statute under construction, an order of a subordinate agency should not be given precedence over a state statute otherwise valid, unless it conforms to a high standard of certainty. Furthermore, under the supremacy clause, a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. Nonetheless, under the supremacy clause, even in the absence of express pre-emptive language, Congress' intent to pre-empt all state laws in a particular area may be inferred where there is a need for uniformity or where the scheme of federal regulation is sufficiently comprehensive as to make a reasonable inference that Congress left no room for supplemental state regulation.

55 Treaties

Under Article II of the Constitution of the United States, the President is given the authority, by and with the advice and consent of the Senate, to make treaties, provided that two-thirds of the senators present concur. Once approved by the Senate, such treaties, under the Constitution's supremacy clause, become a part of the supreme law of the United States.

Treaties, to the extent that they are self-executing, or, if nonself-executing to the extent that Congress has implemented them by legislation and conventions (but not through so-called executive agreements), have the force and effect of legis-

lative enactments, and to all intents and purposes are the equivalent of acts of Congress. Thus, while in force, treaties are the supreme law of the land,

Ratified treaties are of equal dignity with acts of Congress, and override and supersede earlier conflicting federal statutes (but not later-enacted federal statutes), as well as conflicting state statutes, local ordinances, and state constitutional provisions. By express command of the Constitution, it is the duty of the judges of every state to uphold and enforce treaties of the United States, anything in the constitution or laws of any state to the contrary notwithstanding; and all courts, state and national, must take judicial notice of a treaty of the United States. In fact, by virtue of the supremacy clause, the terms of a treaty or convention entered into by the United States can even limit the exercise of jurisdiction by state courts. Treaties should be given authoritative effect and a liberal interpretation to foster their apparent purposes. Nonetheless, while treaties are to be liberally construed, no construction should be made that infringes upon the United States Constitution itself or that restricts the inherent powers of the states.

Observation: Among the more notable of the many treaties entered into by the United States are:

.The United Nations Charter;

.The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;

.The Panama Canal Treaty;

.The Hague Convention on the Civil Aspects of International Child Abduction;

.The Warsaw Convention establishing the liability of international air carriers for harm to passengers and goods thereon; and

.The Charter of the Organization of American States.

There is no limitation as to subject matter on the treaty-making power as exists in the case of the legislative power; nevertheless, the federal power does not extend to the making of treaties which change the Constitution or which are inconsistent with our form of government, with the relations of the states and the United States, or with the Federal Constitution, nor does it extend so far as to authorize a cession of any portion of the territory of one of the states without its consent.

A treaty cannot be considered as the law of the land within the meaning of the Federal Constitution, and as such binding on the courts, if in making it the limits of the treaty-making power have been exceeded.

56 Indian treaties

The United States deals only with Indian nations, tribes, or bands, and does not enter into contracts, compacts, or treaties with individual Indians. A treaty with an Indian tribe has the same force and effect as a treaty with a foreign nation, and should be construed liberally in favor of Indians. Any doubts or ambiguities concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the tribe.

Caution: Until 1871, Indian tribes were recognized by the United States as possessing the attributes of nations to the extent that treaties were made with them, but in that year, Congress, by statute, declared its intention thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them, instead of by treaty. Consequently, since that time, Indian affairs have been regulated by acts of Congress.

An Indian treaty becomes a part of the law of the land, supersedes all customs contrary thereto, and cannot be annulled either in effect or operation by the courts or state legislatures.

Observation: The Indian sovereignty doctrine, which historically gives state law no role to play within a tribe's territorial boundaries, provides the backdrop against which all applicable Indian treaties and federal statutes must be read.

The Federal Government is bound to carry out the obligations of such treaties in the same manner as an individual would be bound, and Congress cannot impair rights vested under these treaties. Congress may, however, supersede the treaties by acts, since its power to abrogate the provisions of Indian treaties is unquestioned.

57 Federal court decisions

State courts are bound by decisions of the United States Supreme Court as to federal law, so that, for example, a United States Supreme Court decision regarding a question of the construction or application of the Federal Constitution binds all state courts in interpreting and applying federal constitutional law. In addition, state courts are bound by United States Supreme Court decisions as to the validity of state statutes under the Federal Constitution.

Observation: Even though the United States Supreme Court has declared a state statute valid under the Federal Constitution, a state court may find that the statute is unconstitutional under the state's constitution. Although there is modest authority to the contrary, it is the general rule that decisions of lower federal courts on federal questions are not binding on state courts. A state court is not bound by opinions of the United States Supreme Court in construction of a state statute, although where federal and state statutes are similar and are intended to accomplish the same objects, state courts, in construing the state statutes, will be strongly inclined to follow federal court construction, especially where the state law was purposely modeled on the corresponding federal statute.

58 Generally

A state constitution is the supreme written will of the people of a state regarding the framework for their government and is subject only to the limitations found in the Federal Constitution. It is the basic and supreme law of a state. It must be interpreted and given effect as the paramount law of the state, according to the spirit and intent of its framers. State constitutions derive their force, not from the conventions which framed them, but from the people who ratified them, and the intent to be arrived at when ascertaining the meaning of constitutional provisions is that of the people.

A state constitution declares general principles or policies and establishes a foundation for the law and the government, and is the direct and basic expression of the sovereign will. It is the mandate of a sovereign people to its servants and representatives, and no one of them has a right to ignore or disregard its mandates; the legislature, the executive officers, and the judiciary cannot lawfully act beyond its limitations. Thus, it is also the absolute rule of action and decision for all departments and offices of government with respect to all matters covered by it, and must control as it is written until it is changed by the authority which established it.

While the text of a state constitution must always be the primary guide to the purpose of a constitutional provision, it must be interpreted in a principled way that takes into account the history, structure, and underlying values of the document. Among the various interests that state governments seek to protect and promote, those interests represented by the state constitution are paramount to legislative ones, and thus no function of government can be discharged in disregard of or in opposition to the fundamental law.

Constitutional provisions control in any case of conflict with lesser laws, such as statutes, local ordinances, or administrative regulations. Thus, acts passed by the legislature inconsistent therewith are invalid. Neither an emergency nor economic necessity justifies a disregard of cardinal constitutional guarantees, nor can the common law or public policy considerations can override constitutional mandates. It is the obvious duty of the legislature to act in subordination to the state constitution, for with reference to the subjects upon which the constitution assumes to speak, its declarations and necessary implications are conclusive upon the legislature. Thus, constitutional provisions prevent the enactment of any law which extinguishes or limits the powers conferred by the constitution.

A state constitution is equally binding on the political subdivisions and courts of the state, and on every department and officer and every citizen. Any attempt to do that which is prescribed in any manner other than that prescribed or to do that which is prohibited is repugnant to that supreme and paramount law and is invalid.

59 Effect of emergency

The principles already stated with reference to the exercise of powers during emergency and the relation thereto of the provisions of the United States Constitution are equally applicable to the provisions, inhibitions, and guarantees of the various state constitutions. Thus, no new power or authority is created by a public emergency, although such a situation may disclose the existence of latent power and may call for liberal construction of constitutional powers.

Many state constitutions or legislation enacted pursuant to such constitutions, provide for the exercise, usually by the state's governor, of emergency powers, although some do not so provide in specific situations.

60 General rules of construction; clear and unambiguous provisions

In line with the rule that the determination of the constitutionality of legislation is for the courts, it is held that although those who are charged with official duties, whether executive, legislative, or judicial, must necessarily construe the constitution in some instances, the construction of the constitution is, generally, the peculiar province of the courts, whose duty it is to follow and to give effect to its plain and unambiguous language and to construe only those parts of the con-

stitution which are not plain and unambiguous; and where a court of last resort has construed a constitutional provision, such construction is binding on all departments of government, including the legislature.

Construction of a constitutional provision is not required in every case. Where a word or phrase in a constitution is ambiguous, however, it is the duty of a court, in construing the meaning of that word or phrase, to attempt to determine whether an exact meaning was intended and, if so, to ascertain that meaning. Nevertheless, a constitution ordinarily should be read according to the plain meaning of its language and subtle constructions for the purpose of limiting its operation must be avoided; moreover, there is no need for interpretation where its words are clear, explicit, and unambiguous. A constitutional provision which is positive and free from all ambiguity must be accepted by the courts as it reads, and should be applied rather than construed. In such a case no construction is permissible, and there is no excuse for interpolation or addition. Instead, constitutional provisions should be given a reasonable and practical interpretation in accordance with common sense.

The courts have no right, by construction, to substitute their ideas of legislative intent for that unmistakably held by the legislature and unmistakably expressed. In other words, the courts are not at liberty to search for its meaning beyond the instrument, or to amend a constitution by judicial decision. The aim of judicial construction, and also its limitation, is to determine the meaning of what has been written -- not to delete sections from the constitution on the theory that if conditions had been different, they would not have been written.

As is true in every case involving the application or interpretation of a constitutional provision, an analysis must begin with the language of the constitutional provision itself. Language which is plain and easily understood should be looked to without extrinsic aid for the meaning intended, and it is only where a constitutional provision is not clear that resort must be had to construction based on external interpretative aids.

61 Giving effect to every word and part

An elementary rule of construction is that, if possible, effect should be given to every part and every word of a constitution, and that no portion of the fundamental law should be treated as meaningless or superfluous, unless there is some clear reason to the contrary. The legal intendment is that every word and every clause has been inserted for some useful purpose, and, when rightfully understood, has some practical operation; each word, it has been said, must be presumed to have been carefully chosen and intentionally placed, as though it had been hammered into place. Therefore, it is not to be presumed that any clause in a constitution was intended to be without effect.

A court should avoid a construction which renders any constitutional provision meaningless, purposeless, or in conflict with another provision, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. Apparently conflicting provisions of a constitution or ambiguous provisions should, if possible, be construed harmoniously.

Observation: The rule favoring the harmonization of different constitutional provisions has been applied not only to provisions of the same constitution but also to provisions of a state constitution and the United States Constitution; in this context, it has been held that where a provision of a state constitution is capable of two constructions, one of which would be in conflict with the United States Constitution, the other must be adopted.

62 Harmonizing amendments with antecedent constitutional provisions

In accordance with the general rule that harmony in constitutional construction should prevail whenever possible, an amended constitution must be read as a whole, as if every part of it had been adopted at the same time and as one law. Effect should be given to every part of the constitution, as amended, and amendments should be construed so as to harmonize with other constitutional provisions.

A constitutional amendment is not to be considered as an isolated bit of design and color, but must be seen as an integral part of the entire harmonious picture of the constitution. A new constitutional provision adopted by a people already having well-defined institutions and systems of law should not be construed as intended to abolish the former system, except insofar as the old order is in manifest repugnance to the new constitution, but such a provision should be read in the light of the former law and existing system.

Repeal of a constitutional provision by implication is accomplished when a constitutional amendment takes up a whole subject anew and covers the entire subject matter of the original constitutional provision. In construing a constitutional provision, however, implied repeals are disfavored. Thus, if a constitutional amendment contains no express repeal or modification provisions, the old and the new provisions should stand and operate together if by so doing the intent of

the lawmaking power as duly expressed in the later provision is not contravened. Nonetheless, under some state constitutions, the intention of the framers and the electorate to retain a prior constitutional provision must be explicit or clearly and unambiguously implicit in the current constitution in order to save the prior provision from repeal; a merely ambiguous suggestion of retention does not, as a general rule, justify further interpretation by a court in search of such intention. Similarly, a constitutional amendment which takes the form of a repeal will not ordinarily be held to affect constitutional provisions to which the repealed provision was related. And where a particular later amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that amendment, not a more generalized and earlier notion, must be used as the guide for analyzing such protection.

63 Irreconcilable conflict between provisions

It is not to be supposed that a constitution whose every section was carefully considered has been framed with contradictory provisions, although what was provided in one section may be restrained or qualified by the provisions of another; but where an irreconcilable conflict does exist between different provisions of the constitution, the office of judicial construction is to determine which shall prevail. Distinct provisions of the constitution are repugnant to each other in such a way as to be irreconcilable only when they are related to the same subject, are adopted for the same purposes, and cannot be enforced without material and substantial conflict.

A constitutional provision does not necessarily trigger heightened scrutiny merely because its language is detailed or otherwise specific rather than general in nature. In such a case, if there is a conflict between a general and a special or specific provision in a constitution, the special or specific provision must prevail in respect of its subject matter, since it will be regarded as a limitation on the general grant, but the general provision will be left to control in cases where the special or specific provision does not apply. Although the terms of an organic provision will not be strained to imply limitation upon the lawmaking power of the legislature, where express and definite limitations are imposed by one section of organic law, amendments of other sections of the constitution will not be construed to remove such fixed limitations further than the terms of the amendment fairly require.

If there is a real inconsistency between a constitutional amendment and an antecedent provision, the amendment must prevail because it is the latest expression of the will of the people. In such a case there is no room for the application of the rule as to harmonizing inconsistent provisions. If it covers the same subject as was covered by a previously existing constitutional provision, thereby indicating an intent to substitute it in lieu of the original, the doctrine of implied repeal, though not favored, will be applied and the original provision deemed superseded.

When two amendments are adopted on the same day, they should, if possible, be so construed that effect may be given to both, but where a section of the constitution is amended at the same time by two different amendments, and the amendments adopted are directly in conflict, and it is impossible to determine which should stand as a part of the constitution or to reconcile the same, then they must both fail.

64 Rules of grammar, composition, and punctuation

Constitutions should be construed liberally, and should not be limited by technical rules of grammar, although some weight should be given to such rules and an effort should be made to construe the language in accordance with those rules rather than contrary to them, where possible. Similarly, the elegance of composition may be sacrificed, and verbal discrepancies may be disregarded, to arrive at the proper construction of a provision. However, a court must always be reluctant to stretch the meanings of words and should be particularly careful not to give them a flavor or a limit they were not intended to have, and a court should be doubly hesitant when the words define constitutional rights.

It is a well-settled rule of construction that, where no contrary intention appears, relative and qualifying words and phrases refer, both grammatically and legally, to the last or nearest antecedent noun.

Punctuation is not considered part of an enactment, and it is not a controlling factor in the construction of constitutional provisions to any greater extent than it is in the construction of statutes. Punctuation may be ignored when it becomes necessary to ascertain the true meaning of the language of a provision.

65 Federal court decisions construing state constitutions

State courts are not bound to follow a decision of a federal court, even the United States Supreme Court, dealing with state law. Thus, a state court is not bound to follow a decision of a federal court construing the constitution of that state, although a federal court's construction of a state constitution may have persuasive effect on the courts of that state.

66 Generally

The duty and function of the court is to construe, not to adopt or rewrite, a constitution, and a constitutional restriction is, within its defined limits, to be enforced according to its letter and its spirit. The court, therefore, in construing a constitutional enactment, is usually said to be limited to the language of the enactment itself. It may not be governed by what the framers of the amendment might have meant to say, but is of necessity controlled by what they did say.
67 Consideration of spirit, as against letter
A constitution must be interpreted and given effect as the paramount law of the state, according to both the spirit and intent of its framers. The true aim of constitutional interpretation, both as to grants of powers and with respect to prohibitions and limitations, is to give a full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose of the document. A court will not go outside the plain language of a constitutional provision unless the intent of its language is unclear; where the language is unclear, however, the court may then look to the context, effect, consequences, and spirit of the law. [n7]

Whenever language is not explicit, or admits of doubt, it is presumed that it is intended to be in accordance with the acknowledged principles of justice and liberty, even though, according to some views, this would require a deviation from the strict letter. A constitutional provision should receive a fair and liberal construction, not only according to its letter, but also to its true spirit and the general purpose of its enactment, and the interpretation of constitutional principles must not be too literal.

In interpreting constitutional provisions, the courts should consider the substance of things, rather than mere matters of form or of technical procedure. In the interpretation of constitutional provisions, it is also true that words are often limited and restrained to a scope and effect somewhat narrower than their literal import on a presumption against an intent to interfere with or innovate upon well-established and generally recognized rules and principles of public policy not expressly abolished. On the other hand, although the spirit and true meaning of a constitution will govern in its construction, they must be very apparent to overrule words actually used therein. Thus, a case falling within the words of a constitutional provision must also be within its operation, unless there is something in the literal construction so obviously absurd, mischievous, or repugnant to the general spirit of the constitutional instrument as to justify an exception. The spirit of a constitution cannot consist of mere sophistry or fanciful or conjectural theory, but must be found in those implications and intendments which clearly flow from the express mandates of the constitution as considered in the light of circumstances and historical events leading up to its adoption.
68 Generally
Since constitutions must of necessity be general rather than detailed and prolix, many of the essentials with which they treat are impliedly controlled or dealt with by them, and implication plays a very important part in constitutional construction. In construing the Constitution of the United States, what is implied is as much a part of the instrument as what is expressed. The rule is equally applicable to the construction of state constitutions. All power necessary to render effective a provision of a constitution is held to be implied and intended in the provision itself. Thus, where a constitution confers a power or enjoins a duty, it also confers by implication all powers that are necessary for the exercise of the one or for the performance of the other. For example, the absence, in the Federal Constitution, of a provision for a presidential privilege as to his or her communications, corresponding to the privilege of members of Congress under the speech or debate clause of the Constitution, is not dispositive of the presidential privilege, since that which is reasonably appropriate and relevant to the exercise of a granted power is considered as accompanying the grant.

The intent of a constitution may be shown by the implications, as well as by the words of express provisions. However, it is presumed that the words employed in a constitution have been carefully measured and weighed to convey a certain and definite meaning, with as little as possible left to implication.

The fact that some degree of implication must be given to words is a proposition of universal adoption; implication is only another term for meaning and intention apparent in the writing on judicial inspection.

The doctrine of construction by implication is limited to the extent of preventing judicial amendment of the fundamental law. An implication will not be read into a constitutional amendment where prior similar amendments contain express provisions regarding the matter in question. And a grant of enlarged power by a constitutional provision will not be rested upon doubtful implication arising from the omission of a previous express limitation, at least unless it appears that the omission and its significance was called to the attention of the people.
69 Implications from words of limitation and grant; words of limitation

The maxim "expressio unius est exclusio alterius" does not apply with the same force to a constitution as to a statute. There are many exceptions to the rule, and it should be used sparingly. Nonetheless, in construing a constitution, resort may be had to the maxim so that the expression of one thing in a constitution may necessarily be held to involve the exclusion of other things not expressed.

The maxim is not a rule of law, but rather one of construction, used as a tool to cut through ambiguities to lay bare the intendment of a provision. Specifically, the maxim appropriately applies only where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended to be included; and it is subject to the limitation that, like all other mere rules of construction applied to ambiguous words, it must yield to proof of surrounding facts and circumstances which satisfactorily demonstrates that the meaning intended was different.

Since the legislative power is plenary, the courts must proceed with much caution in applying such maxim to the legislative department, as, for example, in connection with its taxing power. Moreover, the maxim does not mean, where two powers are not inconsistent, that the granting or affirmance of one of them is a prohibition of the exercise of the other. As examples of the maxim's application, the United States Supreme Court has held that the House of Representatives could not add to the qualifications specified in the United States Constitution to serve as a House member, and a state supreme court has held that a state may not impose term limits on United States senators and representatives because this results in the imposition and addition of new qualifications to those stated in the United States Constitution.

Closely allied to the above maxim or rule, or perhaps merely an alternative means of expressing it, is the statement of some courts that exceptions or provisos in a constitution will be narrowly and strictly construed, and will be limited to objects fairly within their terms. This rule is exemplified by provisions for exemption from taxation. A proviso does not enlarge or extend the section of the constitution of which it is a part, but is rather a limitation or restraint upon the language which the legislature or the framers of the constitution employed.

Another important canon of construction of a similar nature which is frequently applied to constitutions is that the limitations of a power furnish a strong argument in favor of the existence of that power. Where a restriction is not general, but is stated in connection with a specific situation, its application will not be carried to other situations. And where a qualifying word or phrase is found in one provision and not in some other provision, the presumption is that the other provision was not intended to have such qualification. While that which clearly falls within the reason of a constitutional prohibition may be regarded as embodied within it, it cannot be mechanically inferred from a constitutional provision which is prohibitory in nature that what is not prohibited is thereby affirmatively guaranteed; the decision to prohibit is simply a decision to foreclose a contrary view as to the area dealt with, and what is left untouched remains within the jurisdiction of the government.

70 Words of grant

The meaning of language embracing a grant of power is determined according to the condition of things at the time the provision was framed. Those things which are within grants of power as the grants were understood when made are still within them and those things not then within them remain still excluded. Where the means for the exercise of a granted power are given in a constitution, no other or different means can be implied as being more effectual or convenient, for where a power is expressly given by a constitution and the mode of its exercise is prescribed, such mode is exclusive of all others. Thus, in the grants of powers, and in the regulation of the mode of their exercise, there is an implied negative -- an implication that no other than the expressly granted powers pass by the grant, and that they are to be exercised only in the prescribed mode; and under the nondelegation doctrine, the validity of the power sought to be vested must be measured by the scope of the grant of power, not the extent to which it has been exercised. Constitutional grants of power should be strictly construed, although this does not mean that a grant of power can be ignored; furthermore, grants of power made in a constitution cannot be taken away by the legislature.

Under the "rational basis review" test, so long as an act of Congress bears some reasonable relationship to the grant of power to the national government, and it is not otherwise prohibited by the Constitution, a reviewing court must find the law to be necessary and proper. The negative corollary of affirmative grants of power to Congress in Art. I, ß 8 of the Constitution is that those powers not listed do not belong to Congress.

71 Ordinary, natural, plain, or usual meaning

Words or terms used in a constitution, being dependent on ratification by the people voting upon it, must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be

applied in interpreting statutes and acts of the legislature. Thus, it is a well-settled rule, and one said to be in accord with obvious good sense, that words appearing in a constitution are presumed to have been used according to their ordinary, plain, natural, and usual signification and import. The language in constitutions is to be interpreted according to its fair and reasonable import. The words of the constitution must be taken to mean what they most directly and aptly express, in their usual and popular significance, and not in a vague and general sense, and in construing a constitution the courts seek the meaning that such words would convey to an intelligent, careful voter. It is to be supposed that the authors of the constitution had a thorough knowledge of the force and extent of the words they employed. When the court concludes that the constitution's drafters intended to use a word in its ordinary meaning, the inquiry stops, and it will not go on to decide whether or not the provision is sensible or wise. The courts are not at liberty to disregard the plain meaning of the words of a constitution in order to search for some other conjectured intent.

In undertaking to ascertain the ordinary, usual, and commonly understood meaning of words, the court will look first to dictionary definitions, but such definitions are not necessarily a reliable guide. In construing constitutional language, if the dictionary does not conclusively point to a definition advanced by either party in litigation, a court may rely on the principles of statutory construction to determine which definition should be adopted.

Disjunctive words, such as "or," will be given their ordinary construction, unless there is an obvious intention to the contrary on the part of the framers of the provision, or unless the ordinary meaning would produce a result that is absurd, impossible of execution, or highly unreasonable, or one that would manifestly change or nullify the intention of the framers of the provision. And where a phrase has acquired a well-defined meaning in legislative enactments, it will be presumed that it retains the same meaning when incorporated into a constitutional provision, unless the context indicates that it was intended to convey a different idea.

72 Avoidance of narrow, technical, or absurd construction

In accordance with the basic rules that language in a constitution is to be deemed to have been used therein in its ordinary sense, the principle has been developed that the framers of a constitution are assumed to have employed the words used therein in a comprehensive sense as expressive of general ideas rather than of finer shades of thought or of narrow distinctions, and ordinarily words in an instrument such as the United States Constitution or a state constitution are not construed as having a narrow, contracted meaning, but are presumed to have been used in a broad sense, with a view of covering all contingencies. Where words are used which have both a restricted and a general meaning, the general must prevail over the restricted unless the nature of the subject matter of the context clearly indicates that the limited sense is intended.

Stated differently, the rule is that no forced, strained, unnatural, narrow, or technical construction should ever be placed upon the language of a constitution. Nor should the judiciary indulge in or follow any ingenious refinements or subtlety of reasoning as to the meaning of its provisions. It is also clear that there should be no such construction of language that would lead to absurd, unreasonable, or impractical results, even if this entails a disregard of the plain meaning of the Constitution.

73 Words having technical or legal connotation

The general rule that constitutional language should be interpreted in accordance with its ordinary or usual meaning does not apply to technical or legal words and phrases which necessarily should be given a technical or legal significance.

The presumption is that where a word having a technical as well as a popular meaning is used, the word has been used in its popular sense, unless the very nature of the subject indicates, or the context suggests, that the word is used in its technical sense. Technical terms in a constitution applicable to a particular profession or business will be interpreted as they are usually understood by persons in such profession or business, unless the words are clearly used in a different sense.

74 Construction with reference to common law

An important canon of construction is that constitutions must, or at least may, be construed with reference to the common law, although the reverse is not necessarily true, since, in most respects, the federal and state constitutions did not repudiate, but cherished, the established common law.

Provisions of the Federal Constitution have been interpreted by reference to the common law in existence at the time of the writing of that document. This is because the United States Constitution and the plan of government of the United

States were founded on the common law as established in England at the time of the Revolution. Therefore, it is a general rule that phrases in the Bill of Rights taken from the common law must be construed in reference to the latter.

The constitutional prerogatives of sheriffs under some state constitutions, for example, are limited to the immemorial, principal, and important duties of the sheriff that were unique to the office of sheriff at common law and gave character and distinction to the office. And a number of courts have referred to the common law right to trial by jury and the right of the public and the press to attend open trials in interpreting constitutional provisions granting or preserving such a right. Furthermore, in determining whether compelling reasons exist to construe a state constitutional provision so as to provide greater rights than those afforded by the Federal Constitution, one factor which may be considered includes any common-law history and state laws pre-existing the constitutional provision.

Whether a clause in a constitution is to be restricted by the rules of the English law as they existed when the constitution was adopted depends upon the terms or the nature of the particular clause in question. The common law to be applied in construing constitutional provisions must be correlated in time with the Constitution, and cannot be a common-law principle which was evolved or changed after the adoption of the organic law. Where the scope and meaning of a constitutional provision depend upon the common-law rule existing at the time of its adoption, the rule is to be determined as it existed at that time, without respect to subsequent changes therein. It is apparent, therefore, that the common law does not govern the construction of all constitutional provisions; and the Supreme Court has declared that in applying the doctrine which justifies recourse to the common law for constitutional construction, that doctrine, like other canons of construction, must yield to more compelling reasons whenever they exist. Such compelling reasons include incongruity with the intent of the adopters or alteration of the plain purpose of the provisions, or the constitutional framers deliberate intention to change the common-law rule.

Manifestly, where a constitution is in conflict with the common law, the former will prevail over the latter; and this is so, whether the conflict is as to a right or a remedy. The application of the doctrine is further subject to the qualification that the common-law rule, if and when invoked, shall be one not rejected by our ancestors as unsuited to their civil or political condition.

75 Terms used elsewhere in constitution

In construing the meaning of a particular term in a constitution, resort may be had to other sections of the same instrument for the sense in which the term is used, since a term repeatedly used in a constitution in a plain and manifest sense will generally be given the same meaning throughout the instrument, whether such meaning is technical or popular in its character. And certainly this is the rule where the same word or phrase is used in different sentences within the same section. But this principle is subject to the obvious limitation that the same words may not necessarily have the same meaning attached to them where found in different parts of the same instrument, since their meaning is actually controlled by the context.

Where, in a constitution or statute, a word or phrase is repeated, and in one instance its meaning is definite and clear and in another it is susceptible of two meanings, it will be presumed to have been employed in the sense in which its meaning was clear. In addition, where two parts of a constitution use different language to address the same or similar subject matter, a difference in meaning is presumed as the result of using the different language.

76 Particular terms defined or construed

Illustrative of the many and varied terms in constitutional provisions which have been judicially defined or construed, and the contexts in which they appeared, are the following:

(1)"ancestry," in a provision prohibiting discrimination;

(2)"as defined by law," in connection with a provision exempting from taxation property of nonprofit religious or educational organizations;

(3)"candidate," in connection with a provision for forfeiture of office by any justice or judge who shall become a candidate for an elective office;

(4)"cases respecting title to land," in connection with a provision relating to jurisdiction and venue;

(5)"earlier operation," in connection with a provision relating to operability of legislative acts;

(6)"elections," in connection with a provision relating to the filling of vacancies in the state legislature;

(7)"employees," within a provision relating to retirement salaries;

(8)"for cause," in connection with a provision relating to the removal of a judge or justice;

(9)"full cash value," in connection with a state proposition which limited both the valuation of real property for tax purposes and the maximum tax rate that could be imposed on such property;

(10)"immediately necessary," in connection with a provision relating to an exception from referendum of laws immediately necessary to preserve the public peace, health, or safety;

(11)"in the same manner," in connection with a provision relating to election of constitutional convention members;

(12)"majority of the electors voting" or "majority of the votes cast," in connection with determination of the number of votes sufficient to adopt an proposed amendment;

(13)"municipality," in connection with a provision relating to school districts;

(14)"necessary," in connection with a labor dispute;

(16)"personal application," in connection with a provision relating to a system of permanent voter registration;

(17)"powers," in connection with a provision relating to the exercise of authority by the various branches of government;

(18)"prescribed by law" and "provided by law," in connection with the application and effect of statutes;

(19)"president of the senate," in connection with a provision assigning that function to the lieutenant governor;

(20)"public lands," within a provision relating to the right to fish;

(21)"resident," in connection with the application of a provision to a corporation;

(22)"taxes" and "taxation," in connection with a provision relating to assessments for local improvements;

(23)"tons burden," under a constitutional provision exempting certain vessels from taxation;

(24)"upon occupations," in connection with a provision relating to the imposition of taxes by home-rule units.

(25)"validate" and "ratify," in connection with a provision relating to the adoption of legislation based on a constitutional amendment; and

(26)"written ballot," in connection with a provision relating to the manner of voting on constitutional amendments.

77 State constitutions when construing Federal Constitution

The United States, with its vast array of federal, state, district, commonwealth, and territorial constitutions, is a vast source of comparative and public law jurisprudence. Furthermore, the state constitutions are in many provisions very close replicas of the United States Constitution. It should not be surprising, then, that the United States Supreme Court, in construing parts of the Federal Constitution, has occasionally looked to the construction given to similar parts in the state constitutions by the courts and people in the various states.

In determining whether rights are so fundamental as to be made binding upon the states through the Fourteenth Amendment, the Supreme Court has traditionally looked at the practices in the states. For example, in determining originally whether states under the Fourteenth Amendment should be required to appoint counsel for indigents in all felonies, the Court looked to the holdings in the states and found that they did not treat this right as fundamental. It must be noted that this source did not precipitate an altogether satisfactory ruling by the Court, and it was later repudiated. Again, in deciding whether the exclusionary rule should be made binding upon the states, the Supreme Court originally looked at the practices in the states and, finding that the majority of them had refused to honor the rule, the high court refused to make the rule part of Fourteenth Amendment due process, although this ruling, too, was subsequently repudiated by the Supreme Court. There are many additional instances in which the Supreme Court has looked to practices in the states under their constitutions. For instance, when the Court could find no state court authority allowing amendment of grand jury indictments by the prosecution, the Court held the same way in interpreting the Fifth Amendment. The fact that state courts had under their constitutions regularly allowed the legislature to conduct investigations was noted by the Supreme Court in holding that Congress possessed a comparable power.

78 Constitutional jurisprudence of other countries

The United States Supreme Court has seldom explored the judicial responses of other countries in the area of constitutional law. Nonetheless, there are a few instances in which the Supreme Court has openly investigated the jurisprudence

of other lands. Thus, in one case, the court looked at the practice of the United Kingdom and British Commonwealth countries and, finding that of the 10 jurisdictions which had passed upon the question none excluded evidence because it had been wrongly seized, the court refused to set aside a conviction under Fourteenth Amendment due process because illegally seized evidence had been used at trial. However, it should be noted that the ruling did not long survive. In another case, the court indicated that due process was to be defined by the "canons of decency and fairness which express the notions of justice of English-speaking peoples." The Court has also considered the importance of the English common law's special regard for the home to the development of Fourth Amendment jurisprudence, noting that under the English law in this respect, "no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony, and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass." In determining the foreign affairs powers of the United States, the Supreme Court considered relevant the powers possessed by other nations, and remarked that as a member of the family of nations, the right and power of the United States in that field were equal to the right and power of the other members of the international family. And in ruling that the United States could by military commission order the death of saboteurs and spies who landed here, the Court noted that this was a customary holding in other lands. These examples, among others that could be cited, suffice to show the instances and circumstances in which the Supreme Court has considered the jurisprudence of other nations.

79 Earlier constitutions of same state

The clue to the real meaning of an ambiguous provision in a state constitution frequently may be found by reference to corresponding provisions of the constitution which preceded it. Framers of a new constitution who adopt provisions contained in a former constitution to which a certain construction has been given are presumed as a general rule to have intended that these new provisions should have the meaning attributed to them under the earlier instrument. The embodiment in a constitution of provisions found in previous constitutions, without change of verbiage, precludes a court from giving their language a meaning different from that ascribed to the previous constitutional provisions. Similarly, the incorporation into the constitution, without change of language, of a statutory prohibition will not be construed as intended to change the scope and effect of the prohibition, especially where the prohibition relates to a matter of grave importance as to which there is much controversy.

Conversely, a difference between the language of a provision in a revised state constitution and that of a similar provision in the preceding state constitution is viewed as indicative of a difference in purpose. Also, a corollary to the general principle is that where a word in an amendment or re-enactment of a constitution is omitted, the omission should be presumed to have been intentional. However, a grant of enlarged power by a constitutional provision should not rest upon some doubtful implication arising from the omission of a previous express limitation, at least unless it appears that the omission and its significance were called to the attention of the people.

The rules stated above are applicable to constitutions adopted in immediate succession. Where words used in an earlier constitution are not found in the constitution which immediately succeeded it, but in a later constitution, there is a lack of the continuity which uniformly exists where the general rules are applied, the point being that by reason of the lapse of time it cannot be logically claimed that the words were adopted from the earlier constitution any more than from some other source.

80 Construction of Federal Constitution on state court's construction of state constitution; as binding

Although a provision of the constitution of a state may be similar to a provision of the Federal Constitution, a state court is not bound, in construing the state provision, to follow the federal construction of the corresponding federal provision, since a state constitution, written to address the concerns of state citizens and tailored to a unique regional location, is often a source of protection for individual rights that is independent of and supplemental to the protections provided by the Federal Constitution.

In determining whether a state constitution should be interpreted independently of the United States Constitution, a court may analyze nonexclusive neutral criteria of the textual language, both state and federal court decisions, persuasive precedents from other states, historical insights into the intent of the constitutional forebears, differences in texts, constitutional history, pre-existing state law, the understanding of other branches of government, structural differences, contemporary understandings of applicable economic and sociological norms, fundamental values including justice and social policies, and matters of particular state or local concern. Thus, while it is a significant undertaking for any state court to hold that a state constitution offers broader protection than similar federal provisions, and while it is certainly not sufficient to reject a United States Supreme Court opinion on a comparable federal clause merely because one pre-

fers the opposite result, it has nevertheless been said that a state court is to be informed but untrammeled by the Supreme Court's reading of parallel provisions of the Federal Constitution.

81 As persuasive on state court's construction of state constitution

Although state courts, in construing provisions of state constitutions, are not required to follow federal courts' constructions of similar federal constitutional provisions, such federal construction may be highly persuasive, and a state court will generally follow the federal court decision if and to the extent that it is persuasive and helpful, is not inconsistent with the protections afforded by the state constitution, and provides useful guidance on the issue being considered, especially where state law is silent on the issue. Nonetheless, it has been held that differences in structure between the federal and state constitutions always favors an independent state interpretation; but it has also been held that adoption of federal constitutional precedents that appropriately illuminate open textured provisions of a state constitution in no way compromises the state court's obligation independently to construe such provisions.

82 Where state and federal constitutional provisions are substantially similar

Where federal and state constitutional provisions are substantially similar, they are usually to be deemed identical in scope, import, and purpose and should be considered together as in pari materia, and construed similarly, unless the greater protection found in the state constitution "is deeply rooted in the document." In other words, a state court should not find that a section of a state constitution grants either less protection or greater protection than the Federal Constitution with regard to identically worded provisions unless there is a compelling reason found in history and the intention of the document to do so. If there is such a reason, then adoption by a court, for purposes of state constitutional analysis, of an analytical framework used under the Federal Constitution does not preclude the court from concluding that a statute that would be valid under the Federal Constitution is nevertheless invalid under a state constitution. Thus, a state which adopts the language of the Fourteenth Amendment to the Federal Constitution in its own bill of rights adopts with it the interpretation it has received. And the same meaning must be given to the words "due process of law" found in all state constitutions and the Federal Constitution, and to any determination of reasonableness with regard to classifications under the equal protection clause of the United States Constitution and similar provisions in state constitutions.

83 Federal Constitution as providing floor for state constitutional rights

Although a state court may not interpret its constitutional guarantee which is identical to a federal constitutional guarantee below the federal level, nothing prevents a state court from equaling or exceeding the federal standard. In other words, a state constitution may be construed to afford broader, but not narrower, rights than similar federal constitutional provisions. Determination that a given state constitutional provision affords enhanced protection as compared to that provided by the Federal Constitution in a particular context does not necessarily mandate the same result in a different context; and a decision to depart from the minimum standards afforded by the Federal Constitution and to increase the level of protection under a state constitution should be made guardedly and should be supported by principled rationale.

When state and federal constitutional protections are coextensive, a federal court can decide federal constitutional claims because to do so will decide state constitutional claims as well; however, when protections are not coextensive and the state constitution provides greater protection, a court will decide a case on state constitutional grounds so as to avoid unnecessarily addressing federal constitutional claims. Where federal constitutional law is not more favorable to one who asserts violations of both the state and federal constitutions, a state supreme court begins its analysis under the state constitution, and does not need to make a separate federal analysis unless the Federal Constitution provides greater protection than the state constitution. However, a state constitutional provision which is based on a federal statute should usually be construed in the same manner as the federal statute.

84 Constitutions of other states

There are cases stating generally that judicial decisions in other states with similar constitutional provisions are helpful or persuasive, or should be given great weight, as an aid in the construction of constitutional provisions, but that they are not in themselves conclusive. However, where a state constitutional provision is unique, the decision of a court of that state is final on its meaning, and cases from other states are of no consequence whatever.

Where a constitutional provision has actually been borrowed from another state after it has been construed by the court of last resort of that state, the general rule is that the construction is adopted with the provision.

The presumption that a precedent construction was intended to be followed, like every other, may be rebutted, and if the true intention of the framers of the constitutional provision is shown to be otherwise, the presumption must fail. On the other hand, where a constitutional provision appears to have been in force in several states before it was adopted, it seems that the assumption cannot properly be made that it was borrowed from any particular state, and accordingly the rule that constitutional provisions from an older source carry with them their accepted construction can no longer be

strictly applied. And the rule as to adopted construction does not apply where the provision is construed, after the time of its adoption, by the state borrowing it, or where the construction is adopted in the state originally possessing the constitutional provision after the provision has already been adopted in the borrowing state. The rule is also inapplicable where the context of the portion of the constitution in which the adopted language appears is materially different from that in which it originally appeared.

85 Contemporaneous or long-continued construction

Although neither historical acceptance nor governmental efficiency will save a practice if it is contrary to the Constitution, in questions of constitutional construction, as in the determination of the constitutionality of statutes, great weight has always been attached to a contemporaneous exposition of the meaning of fundamental law, not only where such interpretation is that of the courts, but also where it is that of other departments of government.

"Contemporanea expositio est optima et fortissima in lege" is a maxim of the civil law resting on a foundation of solid reason. The presumption is that those who were the contemporaries of the makers of the constitution have claims to the deference of later tribunals, because they had the best opportunities of informing themselves of the understanding of the framers and of the sense put upon the constitution by the people when it was adopted. Similarly, a construction which has been long accepted by the various agencies of government, and by the people, will usually be accepted as correct by the judiciary, or will at least be given great weight, unless it is manifestly contrary to the letter or spirit of the Constitution, and a court may take judicial notice of widespread opinion and general practices in the interpretation of constitutional provisions. A strong showing must be made to change a settled practice of the nation on constitutional grounds. The general principle favoring contemporaneous construction is usually applied more cautiously to constitutions than to laws, the ability to change the law easily, by legislative action, giving more force to a construction in conformity to usage than is justified in the case of a constitutional provision, which cannot be so readily altered.

Under the general rule requiring that every part of a constitution be given effect, a contemporaneous construction placed upon a constitutional provision will not be permitted to overturn and negate a clear provision of the constitution in cases where the meaning of a clause in the instrument is capable of two interpretations. Contemporaneous construction is further limited by the principle of priority in time, under which nonjudicial construction of a constitutional provision subsequent to a judicial construction by the courts is of no effect in ascertaining its meaning, and by the rule that contemporaneous construction can never be allowed to enlarge, restrict, or contradict the plain meaning of the text. In addition, habit and tradition are not in themselves an adequate answer to a constitutional challenge.

86 Acquiescence in construction

It is a settled rule of constitutional construction that a long-continued understanding and application of a provision in a constitution amounts to a practical construction of it. Such a construction, acquiesced in for many years, is frequently resorted to by the courts, because it is entitled to great weight and deference and because it can be a valuable interpretive aid and a safe guide to the constitutional provision's proper interpretation, and will not be disregarded unless it clearly appears that it is erroneous and unauthorized. Similarly, the fact that for many years a certain construction has been assumed to apply to a constitutional provision is of important force in determining its meaning. However, though such a construction is entitled to great weight, it is not controlling, and the final responsibility for the interpretation of the law rests with the courts, which resort to extrinsic aids such as "contemporaneous construction" only when the constitutional language is ambiguous and unclear.

An important application of the principle of acquiescence as fixing the interpretation of a constitution is found in reference to the exercise of powers. The general rule is that the exercise of powers and general acquiescence therein for a long period of years, especially if commencing with the organization of the government, may be treated as fixing the construction of the Constitution and as amounting to a contemporary and practical exposition of it, and may be sufficient to demonstrate that powers conferred by a statute are not inconsistent with the provisions of the fundamental law. On the other hand, no acquiescence for any length of time can legalize a usurpation of power where the people have plainly expressed their will in the constitution and established judicial tribunals to enforce it.

87 Legislative construction

The principle of contemporaneous construction may be applied to the construction given by the legislature to the constitutional provisions dealing with legislative powers and procedure. Though not conclusive, such interpretation is generally conceded as having great weight or persuasive significance. The legislative history and the contemporaneous construction of a constitutional provision by the legislature that has been continued and followed for a long time are valuable aids as to its proper interpretation, are entitled to great weight and careful consideration when courts interpret the provision, are presumed to be correct, and should not be departed from unless manifestly erroneous.

"Contemporaneous" in this sense means construction by a legislature held while the particular constitution containing the provision to be interpreted was in effect. While neither length of time nor legislative action, though oft repeated, will sanction a violation of the organic law, resort may be had to such sources to discover the meaning of a provision of doubtful import. Legislative history written and circulated after passage of a state constitutional measure is not, however, relevant to any determination of the intent of those who voted for the measure. A legislative analyst's comments, like other materials presented to voters, may be helpful, but are not conclusive, in determining the probable meaning of initiative language; thus, when other statements in election materials contradict the legislative analyst's comments, a state supreme court does not automatically assume that the latter accurately reflects the voters' understanding.

88 Congressional construction

As an aid in the construction of provisions in the Federal Constitution, the Supreme Court has often made reference to the interpretation placed thereon by Congress over the years. As in the case of legislative construction generally, a practical construction by Congress of a provision of the Constitution is entitled to great weight and ought not to be lightly disregarded; and this is especially the case with respect to the construction placed on constitutional provisions by the First Congress.

A long-continued practical construction by Congress of powers under the provisions of the Constitution should be taken as fixing the meaning of such provisions, although one court has held that the ordinary deference it gives to legislative fact-finding does not translate into deference to congressional constructions of constitutional demands.

Caution: The Supreme Court has issued a word of caution about using congressional practices to construe the Constitution, pointing out that the weight of congressional legislation to support or change a particular construction of the Constitution must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. Furthermore, the Court has pointed out that neither a long-standing congressional authorization nor a widely prevailing practice justifies a constitutional violation.

89 Executive and administrative construction

In line with the general rule as to the weight to be accorded contemporaneous and long-continued construction of constitutional provisions, an administrative construction of a constitutional provision that generally has been accepted and acted upon over a long period of years, while not binding upon the courts, is entitled to great weight or at least serious consideration by the courts in determining the meaning of the provision, and they generally will not depart from such a construction unless it is clearly erroneous or unauthorized. There is authority to the contrary, however, some courts holding that the deference which courts give administrative agencies on questions of statutory interpretation does not extend to constitutional issues.

The construction placed upon a particular constitutional provision by the President, a governor, an attorney general or legislative counsel, a state auditor, or other specific executive or administrative officials will be taken into consideration by the courts, although at least one court has held that the federal judiciary does not owe any deference to the Executive Branch's interpretation of the Constitution.

Observation: The Supreme Court, in a case involving a claim of absolute executive privilege by the President of the United States with respect to the celebrated Watergate tape recordings, said that while in the performance of assigned constitutional duties each branch of the government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others, our system of government nevertheless requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.

90 Circumstances attending adoption of provisions; existing conditions, laws, and history

In placing a construction on a constitution or any clause or part thereof, a court may look to the history of the times and examine the state of things existing when the constitution was framed and adopted, in order to ascertain the prior law, the mischief that the new provision sought to correct, and the remedy. This is especially important where the court has been presented with a choice of interpretations or with plausible alternative readings of a particular word, phrase, or section of a constitutional provision. For instance, arguments or explanations made in election materials, ballots, or brochures may be considered in construing constitutional amendments adopted by popular vote. The United States Supreme Court has frequently followed this procedure by making reference to historical materials both before and after adoption of the United States Constitution and the amendments thereto, and to practices and usages in this country at that time, as aids in the interpretation of particular constitutional provisions.

Every constitution has a history of its own which is likely to be more or less peculiar; and unless interpreted in the light of this history the constitution is likely to be made out as supporting purposes which were never within the minds of the people agreeing to it. A constitutional provision must be presumed to have been framed and adopted in the light and understanding of prior and existing laws and with reference to them, and, like a statute, is properly to be expounded in the light of conditions existing at the time of its adoption, the general spirit of the times, and the prevailing sentiments among the people. An understanding of the meaning of constitutional language makes appropriate a review of the background and environment of the period in which that constitutional language was fashioned and adopted. Reference may be made as well to the historical facts relating to the origin of the political institutions of the community and to prior well-known practices and usages. But construction based on custom, usage, or the conclusions of the courts must be properly subordinated to the time factor of the creation of the constitution itself, and later usages cannot override a patent intention expressed at an earlier date. Thus, neither statutes enacted nor judicial opinions rendered since the adoption of a constitution can impute a different meaning to it than that obviously intended at the time the constitution was adopted; and while uniform historical practice is relevant to the meaning of an ambiguous federal constitutional provision, a proffered meaning cannot be supported by historical practices where those practices are not uniform and the core meaning of the provisions are unambiguous.

91 Proceedings of conventions and debates

In the construction of a constitution, recourse may be had to proceedings in the convention which drafted the instrument. Such proceedings are valuable aids in determining the purpose, intent, and consequent meaning of doubtful provisions. However, while a court may look to debates, proceedings, and committee reports of a constitutional convention, such evidence does not have any binding force on the court and, where necessary to resolve a constitutional ambiguity, a court may also look to the object sought to be accomplished and the evils sought to be remedied. The rule is equally applicable to the proceedings of the convention which drafted the Federal Constitution and the proceedings of state constitutional conventions.

The opinions of the individual members of a convention expressed during the debate, although they are occasionally referred to, are seldom considered as of material value as expressions of the view of the convention as a whole, although an early constitutional interpretation may be entitled to great weight in determining the framers' intent especially when the framers later served in one of the branches of government.

The question in interpreting a constitution is not so much how it was understood by its framers as how it was understood by the people adopting it, since the constitution derives its force as a fundamental law, not from the action of the convention, but from the people who have ratified and adopted it. Accordingly, debates of a convention, while sometimes illuminating, usually are not considered of controlling weight upon the construction of constitutional provisions and can never be resorted to for the purpose of overruling a plain and unambiguous provision.

92 The Federalist and other contemporary writings

Under the rule that contemporaneous construction may be referred to, it is an accepted principle that in the interpretation of the Constitution of the United States recourse may be had to the Federalist Papers, since the papers included in that work were the handiwork of three eminent statesmen, two of whom had been members of the convention which framed the Constitution. Accordingly, over the intervening two centuries since the Federalist Papers were written, thousands of references have been made to these papers in judicial opinions considering constitutional questions, and they have often been accorded considerable weight. The same rule applies to writings about the Federal Constitution's predecessor, the Articles of Confederation.

For the contemporaneous construction, recourse is occasionally had to other unofficial discussions and expositions, such as Thomas Jefferson's "wall of separation" letter to the Danbury Baptists, which appears to have been given as much respect as anything said in either the Congress or the ratifying conventions that gave us the First Amendment; and in deciding the proper meaning of the clause authorizing Congress by appropriations "to provide for the general welfare," the Supreme Court looked at great length at the views of both Alexander Hamilton and James Madison.

93 Titles, headings, and the like

While the subject matter of an article of a constitution need not be limited to the subject expressed in the title of the article, the provisions should be presumed to relate to the subject matter as expressed in the title unless the context indicates the contrary. A title is not generally required on a proposed constitutional amendment, but if one exists, it may be resorted to as an aid to construction of the amendment by the court, especially where the amendment is ambiguous.

Resort might also be had to the title of an initiative measure submitted to the electors of the state for their approval and prepared at the instance of the proponents thereof. Also, subheadings within a constitution may be relevant in ascertaining the intent or purpose of a provision. However, the division of a constitution into articles, chapters, and sections is a mere matter of convenience for the purpose of reference, and is not of significance in applying the rules of construction and interpretation.

94 Ethics and judicial philosophy of judges; economic and social science data

A number of other factors or considerations affecting the construction of constitutions have been observed. For example, some judges will consciously or unconsciously infuse meaning into constitutional phrases by reference to the ethical values of the culture. It is obvious, for instance, that constitutional decisions hinge upon community values when the judicially announced norm of "contemporary community standards" governs what is obscene or constitutionally impermissible. When the Supreme Court invalidates practices as being contrary to the national public policy, it is obviously applying the ethical and moral standards of the culture.

Many state and federal judges, and particularly justices of the United States Supreme Court, have had well-defined value systems when they went on the bench, and some others have acquired discernible philosophies, and have applied them during their tenure on the high court. Among those that could be cited are Justice Hugo Black's views on freedom of speech, Chief Justice William Rehnquist's views on governmental "checks and balances" and on federal abstention, Justice Antonin Scalia's strict interpretations of the Constitution under the "plain meaning" and "traditionalism" doctrines, Justice Sandra Day O'Connor's views on the free exercise and establishment of religion clauses, and Justice Thurgood Marshall's views on civil rights and capital punishment. From the beginning, justices of the United States Supreme Court have shown a conscious concern for the impact of their decisions and their rules upon the society, and have reflected those concerns in decisions involving the power to tax, laws interfering with interstate commerce, and in many other areas of the law.

A final consideration involves the use of economic data to influence constitutional decisions, particularly with regard to state interference with interstate and foreign commerce; and just as relevant are sociological and anthropological studies in equal protection cases involving racial or sexual discrimination.

95 Generally; presumption

In the interpretation of constitutions, questions frequently arise whether particular sections are mandatory or directory. The courts usually hesitate to declare that a constitutional provision is directory merely, since the legislature may tend to disregard provisions which are not said to be mandatory. Accordingly, it is the general rule to regard constitutional provisions as mandatory, and not to leave any discretion to the will of a legislature to obey or to disregard them, unless it appears from the express terms thereof, or by necessary implication, from the language used, that they are intended to be directory only. The presumption or rule that constitutional provisions are mandatory and prohibitory unless by express words they are declared to be otherwise applies to all sections of the state constitution alike and is binding upon all branches of state government. This presumption as to mandatory quality is usually followed unless it is unmistakably manifest that the provisions are intended to be merely directory. The rules distinguishing mandatory and directory statutes are of little value in this connection and are rarely applied in passing upon the provisions of a constitution.

So strong is the inclination in favor of giving obligatory force to the terms of the organic law that it has even been said that neither by the courts nor by any other department of the government may any provision of the constitution be regarded as merely directory, but that each one of its provisions should be treated as imperative and mandatory, without reference to the rules distinguishing between directory and mandatory statutes. Nonetheless, if a constitutional provision contemplates the enactment of implementing legislation, the provision should be interpreted as establishing general guidelines for the forthcoming legislation rather than mandatory directives as to its content, absent clear language to contrary. If, by reason of unique local conditions, a mandatory constitutional provision serves to confuse rather than to solve the problem with which it is concerned, the consequences must be accepted as inherent in government by law instead of government by edict.

96 Particular constitutional language

Prohibitory language stated in a constitution is nearly always construed as mandatory. If directions are given respecting the time and mode of proceeding in which a power should be exercised, there is at least a strong presumption that it was designed it to be exercised in that time and mode only. And constitutional provisions imposing duties upon the governor and the legislature have been held mandatory. However, a constitutional article providing that all laws are to be made "for the good of the whole; and the burden of the state ought to be fairly distributed among its citizens" presents no con-

stitutional restraint upon the legislative power of the legislature, because it was addressed to the legislature by way of advice rather than as a command.

A specific constitutional provision that its provisions are mandatory and prohibitory unless by express words declared to be otherwise will, of course, be given effect. Such a declaration applies to all sections of the constitution alike, and is binding on every department of the state government, whether legislative, executive, or judicial.

97 "Shall" or "may"

The use of the word "shall" in a constitutional provision is generally considered as an indication of the mandatory character of the provision, although the word "shall" may receive a permissive interpretation when necessary to carry out the true intent of the provision in which that word is found. Thus, use of the word "shall" is not always conclusive.

Permissive constitutional language, such as the word "may," is usually treated as intended in fact to be merely permissive. Accordingly, the word "may" should not be construed as "shall" in a constitutional provision, unless from the whole context the purpose plainly appears to be mandatory, although occasionally the word "may" has been interpreted to mean "shall" or "must." Such interpretation always depends largely, if not altogether, on the object sought to be accomplished by the provision in question. For instance, it seems to be the uniform rule that where the object of the law is to clothe public officers with power to be exercised for the benefit of third persons, or for the public at large -- that is, where the public interest or a private right requires that the thing be done -- then the language, though permissive in form, is peremptory.

98 Generally

A constitution is usually a declaration of principles of the fundamental law, many of its provisions being only commands to the legislature to enact laws to carry out the purposes of the framers of the constitution or mere restrictions upon the power of the legislature to pass laws. However, it is entirely within the power of those who establish and adopt the constitution to make any of its provisions self-executing, that is, operative without any necessity for further legislation.

Criteria which may be relevant in determining whether a constitutional provision is self-executing or not include a description of the right in detail, such as the means for its enjoyment and protection; the absence of any directive to the legislature for further action; a particularly informative legislative history as to the provision's intended operation; a consistency of self-execution with the scheme of rights established in the constitution as a whole.

Observation: Even without the benefit of a declaration that they are self-executing, constitutional provisions in Bills of Rights and those merely declaratory of the common law are usually considered self-executing, as are provisions which specifically prohibit particular conduct.

A clear distinction exists between the questions whether a constitutional provision is mandatory or directory and whether it is self-executing or requires legislation in order to give it effect. A provision may be mandatory without being self-executing, and a provision may be self-executing even though it contains some mandatory language.

99 Definition, nature, and effect

A constitutional provision is self-executing if no legislation is necessary to give effect to it, and if there is nothing to be done by the legislature to put it in operation, unless a contrary intent is clearly shown. Thus, usually no legislation is required to effectuate a constitutional provision that is prohibitory in its language, and conversely, the failure of the legislature to act cannot take away a right constitutionally granted.

It is also a well-established rule that constitutional provisions contemplating and requiring legislation to enforce them are not self-executing and remain inoperative except as implemented by appropriate legislation which carries out the general spirit and purpose of the provisions. A constitutional provision which assumes the existence of certain machinery to carry it out is not self-executing where the machinery previously provided by the legislature is not geared to the carrying out of the particular constitutional mandate; and a constitutional amendment which is not self-executing does not affect existing legislation until the enactment of legislation putting the amendment into effect. Even if a constitutional provision contains a mandatory requirement that the legislature adopt a particular provision, there is no remedy if the legislature fails to obey such constitutional mandate. But the command of a constitutional provision which is not self-executing remains in force, even though it is for the legislature to choose the time and form for carrying out the command.

Observation: It is possible for one portion of a constitutional provision to be self-executing while the remainder is not self-executing, or for a provision to be self-executing as to one class of subjects and not as to another. It is also possible, but not required, for a self-executing constitutional provision to allow for the award of money damages.

100 Presumption of provisions as self-executing

Modern state constitutions have been generally drafted upon the principle that all provisions of a constitution are self-executing. As in the case of the question whether a constitutional provision is mandatory or directory, the courts may be influenced in interpreting such provisions as self-executing rather than as requiring legislation by the knowledge that if not treated as self-executing, the legislature would have the power to ignore and practically nullify the directions of the fundamental law.

101 Effect of status as self-executing or not upon legislative power

A self-executing provision of the constitution does not necessarily exhaust legislative power on the subject, but any legislation must be in harmony with the constitution and further the exercise of the constitutional right and make it more available. Thus, while constitutional provisions which are self-executing require no implementing legislation, legislation that furthers the purpose of self-executing constitutional provisions or facilitates their enforcement is permissible. Legislation may be enacted to prescribe a practice to be used for a self-executing provision's enforcement, to provide a convenient remedy for the protection of the rights secured or the determination thereof, or to place reasonable safeguards around the exercise of the right.

Even though a provision states that it is self-executing, some legislative action may be necessary to effectuate its purposes; but legislative authority to provide the method of exercising a constitutional power exists only where the constitutional provisions themselves do not provide the manner, means, and methods for executing the powers therein conferred.

It is clear that legislation which would defeat or even restrict a self-executing mandate of the constitution is beyond the power of the legislature. Also, the legislature is neither required nor permitted to enact laws purporting to confer rights in excess of and different from those contemplated by the constitution.

102 Generally

One of the recognized tests for determining whether a constitutional provision is self-executing or not self-executing is that it is not self-executing when it merely lays down general principles or a line of policy without supplying the means by which such policy or principles are to be effectuated, or if the language is directed to the legislature in the expectation that it will act, or if it appears from the language used, or the circumstances of its adoption, that subsequent legislation was contemplated to carry it into effect; but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and if there is no language indicating that the subject is referred to the legislature for action.

The fact that a right granted by the constitution might be better or further protected by supplementary legislation does not prevent the provision from being self-executing. However, if a constitutional provision is so vague as not to admit of an understanding of its intended scope, it cannot be self-executing; and a constitutional provision will not be construed as self-executing when to do so would work confusion and mischief.

Observation: The question whether a constitutional provision is or is not self-executing is ultimately one of intention. A construction of a constitutional provision as self-executing is especially appropriate where the intent of the provision's drafters to make specific and immediately effective the right provided for is evidenced by the insertion of operational details.

103 Provision as addressed to legislature

Since a constitutional provision which depends upon legislative action for its effectiveness is ipso facto not self-executing, it follows that in determining whether a provision is self-executing, the question in every case is whether the language of a constitutional provision is addressed to the courts or to the legislature. Constitutional provisions to the effect that laws may be passed by the legislature for particular purposes are not self-executing; and a provision that the legislature should make suitable provisions for carrying a constitutional amendment into effect is obviously addressed to the legislature and is indicative of the intention that such amendment should not become effective until made so by an act of the legislature. Thus, a provision that a thing shall be done "as provided by law," or "in the manner to be pre-

scribed by law," or a provision that the legislature "shall provide by law," is not self-executing. Nevertheless, minor details may be left for the legislature to enact without impairing the self-executing nature of constitutional provisions.
104 Provision as failing to state remedies in connection with rights and liabilities provided for
The omission from a constitution of any express provision for a remedy for enforcing a right or liability is not necessarily an indication that it was not intended to be self-executing. The maxim "ubi jus ibi remedium" (where there is a right there is a remedy) is as old as the law itself. It has been said variously to have originated in the Magna Carta and the common law, as well as in equity, and "tends to tip the balance in favor of vindicating constitutional rights, despite the costs, but not at all costs." A majority of state constitutions contain a "right-to-a-remedy" provision, and the principle was melded into the federal common law early in the days of the Republic. Thus, under some circumstances, by virtue of the principle ubi jus ibi remedium, a person whose clearly established constitutional rights are violated by federal officials may sue them directly even though no legislation by Congress exists specifically authorizing such a remedy, although caution is appropriate a fortiori with respect to implied actions based on the Constitution. However, the "right-to-a-remedy" provision applies only to existing, vested rights, and it is state law which determines what injuries are recognized and what remedies are available.

The principle has been applied by the courts in the context of constitutional law issues in various ways. In connection with a Medicaid hearing case, one court has held that a statutory right to a fair hearing must include within it a right to effective redress; otherwise, this would result in depriving the plaintiffs of property without due process in violation of the due process clause of the Federal Constitution. Another court has held that while the United States Constitution, Article I, ß 4, entrusts to the legislatures of the states the scheduling, planning, and conduct of elections for national office, a candidate may file an action to challenge an election call where the states act in violation of the First Amendment in doing so. Accordingly, it has been decided that if a state constitution declares that a liability shall exist in certain specified circumstances, an action may be maintained to enforce such liability, notwithstanding the nonexistence of any legislation upon the subject.
105 Provision as stating prohibition
Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void. But the general principle that prohibitory provisions prevent their violation without legislation does not go beyond reasonable limits. Such provisions are not self-executing when they merely indicate principles without laying down rules by which they may be given the force of law, and a nonprohibitory constitutional provision which does not merely permit but directs the legislature to implement a newly conferred right is not self-executing, unless the legislative directive is purposeless, because the provision is so complete with respect to the nature of the right and the means of its enforcement as to deprive the legislature of any discretion in either respect.
106 Particular provisions considered to be self-executing
Constitutional provisions which have been construed to be self-executing include --

-- federal and state bills of rights defining the fundamental rights of all persons to privacy.

-- equality of justice and access to the courts.

-- freedom of speech and religion.

-- freedom of the press and assembly, trial by a jury in criminal cases and bail before trial (except in capital cases), and the guarantees against cruel and unusual punishment and excessive bail.

-- freedom from racial discrimination in the exercise of civil rights.

-- the right to initiatives and referenda.

-- prohibitions against the doing of business within a state by foreign corporations except under specified conditions.

-- municipal home rule.

-- creation of a court of judicial discipline.

-- reorganization of a state's court system.

-- creation of a right to be free from employment discrimination.

-- removal of public officers upon criminal conviction.

-- making shareholders of banking or insurance corporations individually responsible for all contracts, debts, and engagements of the corporations to the extent of the par value of their stock.

-- vacation of certain public offices for failure to meet residence requirements.

-- powers of a state public service commission.

-- adoption of a uniform series of school textbooks by the state board of education.

-- school district taxes.

107 Particular provisions not considered to be self-executing

Constitutional provisions which have been construed as not self-executing include provisions relating to --

-- the extent of federal judicial power.

-- the extradition clause of the Federal Constitution.

-- state constitutional provisions dealing with the free exercise of religion, the establishment of religion, and free speech and due process rights.

-- creation and operation of the civil service.

-- payment for legislative election contests.

-- recall election expenses.

-- the powers of a state governor under the separation of powers doctrine.

-- the right to pursue and obtain happiness.

-- the right to attend school campuses that are safe, secure, and peaceful.

-- the privilege protecting confidential communications between a physician and his or her patient.

-- crime victims' restitution rights.

-- a state constitutional provision providing protection for the "life of every unborn child from conception to birth."

-- the licensing of foreign corporations.

-- a grant to the state permitting it to own and operate lotteries.

-- general constitutional prohibitions against gambling, stating that the legislature shall take action.

-- a provision lowering real estate tax assessment rates for nonprofit corporations.

-- materialmen's liens.

-- a prohibition against imprisonment for debt.

-- the right to bring suits against the state.

-- educational, religious, or charitable real property tax exemption provisions.

-- provisions exempting certain classes of property from taxation.

-- the number of hours comprising a lawful day's work in all employment by or on behalf of the state.

-- a provision guaranteeing a citizen's "right to safety."

-- the right to possess and protect property.

-- the jurisdiction of particular courts.

-- a prohibition of the manufacturing and sale of intoxicating liquors.

-- review of an administrative action.

-- establishment of a uniform system of county and municipal governments and by general law classifying cities and towns according to their population and providing for their incorporation, government, and the like.

-- the authority of a municipality to own, establish, and maintain, within or without corporate limits, works involving public health or safety.

-- elections for the purpose of incurring municipal indebtedness.

-- environmental protection powers of a state government.

-- constitutional provisions relating to water rights.

-- the appellate jurisdiction of a state supreme court.

-- a state homestead tax exemption provision.

-- trial by information filed by a district attorney or attorney general.

-- the determination of public school policy and the management and direction of public schools by a board of education.

108 Provisions which may be either or both

The constitution of a particular state may contain provisions dealing with a general subject, some of which are self-executing, and others of which are not. Furthermore, a single constitutional provision may be self-executing in one part and not self-executing in another part. Similarly, the constitutions of different states may contain differing terminology on a particular subject, resulting in opposite judicial holdings on whether a provision in question is self-executing or not, as occurred when courts construed provisions relating to the granting of mechanics' and materialmen's liens, prohibitions against lotteries, appellate court jurisdiction in mandamus, elections, taxation, and treaties with foreign countries. Also, a constitutional inhibition against usury is self-executing only to the extent of rendering usurious contracts illegal, but the power and duty of fixing penalties is delegated to the legislature.

109 Generally

Although the doctrine of judicial supremacy was not established without dispute, it is now a settled principle of the American system of constitutional law that the courts have inherent authority to determine whether statutes enacted by Congress or a state legislature transcend the limits imposed by the federal and state constitutions and to determine whether such laws are or are not constitutional.

Courts, above all else, have a duty to uphold the Constitution, and where a statute is in fact unconstitutional, the court's duty is to declare it invalid, no matter how desirable or beneficial its purposes might be.

Observation: The goal of constitutional adjudication is a simple one: it is to hold the true balance between what the Constitution puts beyond the reach of the democratic process and that which it does not.

There is a strong presumption that constitutional claims are judicially reviewable in some forum. It is within the special province and duty of the courts and the courts alone, to say what the law is, and to determine whether a statute or ordinance is constitutional, and no express constitutional authority for such action is necessary; it is a necessary consequence of our system of government. However, the fact that a court might regard certain statutory provisions as unnecessary is immaterial to determining a statute's constitutionality. Clearly, the assent of the Executive Branch to a bill which contains a provision contrary to the Constitution does not shield it from judicial review.

If a court has jurisdiction to try a case, it has inherent power to determine whether an act, on which the existence of the right of action depends, conforms to the constitution. Any determination by the courts as to whether legislative acts pass constitutional muster may be aided by legislative statements which reflect existing public policies that were relied on in the enactment of the laws being considered by the courts, but the judgments of the courts in deciding whether legislative acts pass constitutional muster must necessarily be independent ones.

Where state constitutions contain no specific provisions confining, limiting, and making subject to restrictions and qualifications the power of the courts to declare statutes unconstitutional, the judicial power is essentially unlimited, but a court, having no general supervision or general veto power over legislation, may not legitimately void a law merely because it does not like it or regards it as impracticable.

Observation: Although a state court may apply a standard of review more stringent than the federal "rational basis" test as a matter of state law under the state's equivalent to the equal protection or due process clauses of the Fourteenth Amendment, when a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not

free to impose greater restrictions as a matter of federal constitutional law than the United States Supreme Court has imposed.

States, by their constitutions and statutes, can restrict the power of particular state courts to declare statutes invalid as violative of the Federal Constitution, so long as a reasonable opportunity exists somewhere in the state system to raise the federal constitutional issues.

110 Limitation by statute or rule of practice

Judicial power to determine the constitutionality of state legislation may be subject to procedural limitations, as where a statute requires that a state's attorney general be served and given an opportunity to be heard in a declaratory judgment proceeding in which a statute, ordinance, or franchise is alleged to be unconstitutional, such a requirement being considered jurisdictional in some states, but not in others. If a rule of practice so requires, a court may also refuse to consider a party's constitutional challenge to a statute where the party has failed to strictly comply with a rule of practice requiring that parties presenting constitutional challenges to statutes must file and serve separate written notices thereof with the state supreme court clerk at the time of filing such parties' briefs, even though the party did file the required notice at the time he or she submitted his or her reply brief.

The jurisdiction of certain courts to hear certain types of cases may also be limited by properly enacted statutes, so long as some type of remedy is provided and so long as the remedy that is provided is adequate. Thus, when confronted with what appears to be a constitutional claim, a tribunal must first determine for itself that it has judicial authority to decide it. As an example, a state has discretion to channel appeals challenging the constitutionality of a tax statute to administrative processes and a tax court so long as those remedies are adequate, since the Federal Constitution does not require all state courts to hear federal constitutional challenges to the imposition of a state tax.

Where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear to avoid the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. Also, rules of practice limiting judicial determination of constitutional issues which, although weighty, fall short of the status of principles ordained by the Constitution, may be made subject to exceptions where there are weighty countervailing policies. Rules of practice limiting judicial determination of constitutional issues will not be applied where their application would itself have an inhibitory effect on freedom of speech.

111 Exercise of power by nonjudicial agencies; judicial power as exclusive

From the very nature of the American system of government with constitutions prescribing the jurisdiction and powers of each of the three branches of government, it has devolved on the judiciary to determine whether the acts of the other two departments are in harmony with the fundamental law. All the departments of the government are unquestionably entitled and compelled to judge of the constitution for themselves; but, in doing so, they act under the obligations imposed in the instrument, and in the order of time pointed out by it. When the judiciary has once spoken, if the acts of the other two departments are held to be unauthorized, or in violation of the constitution or the vested rights of the citizen, they cease to be operative or binding. Thus, the final responsibility of passing upon the constitutionality of a statute rests upon the courts.

Observation: The right to declare an act unconstitutional is purely a judicial power and cannot be exercised by the officers of the executive department under the guise of the observance of their oath of office to support the constitution. The oath of office "to obey the Constitution" means to obey the constitution, not as the officer decides, but as judicially determined, for every law found on the statute books is presumptively constitutional until declared otherwise by the court. Thus, except in carefully circumscribed situations authorized by state law or court decisions, an officer of the executive department of the government has no right or power to declare an act of the legislature to be unconstitutional or to raise the question of its constitutionality without showing that he or she will be injured in person, property, or rights by its enforcement.

112 Courts possessing power

Where the issue is whether particular legislation conforms with, or contravenes, a state constitution, ordinarily all courts within the state have the power and duty to determine the matter, but the court of last resort of the state is the final arbiter. The federal courts, as a general rule, are inclined to refrain from passing upon the conformity of legislation with a state constitution since they are usually concerned only with whether state legislation offends the Federal Constitution; and they will often defer or abstain from passing upon its conformity with the Federal Constitution until a state court has decided the question. Acts of state governors, however, are reviewable in the lower federal courts, as well as in the United States Supreme Court.

In the United States, federal constitutional issues can be litigated not only in the federal courts, but also in the state courts; in fact, state judges have a separate duty to respect and adjudicate claims where they are based on federal constitutional rights said to be protected from state impingement, and an argument that a state's supreme court will not adequately safeguard federal constitutional rights has been squarely rejected by the United States Supreme Court. State courts, equally and concurrently with the federal courts, bear the duty and obligation to enforce and protect every right granted and secured by the Constitution of the United States; and it is the duty of the state courts as much as of the federal courts, when the question of the validity of a state statute is necessarily involved as being in alleged violation of any provision of the Federal Constitution, to decide that question and to hold the law void if it violates that instrument. However, it has always been accepted that Congress can withdraw from the state courts the power to pass upon the constitutionality of congressional acts and federal practices.

The ultimate decision in cases involving the Federal Constitution rests with the United States Supreme Court, which has long has the power to review state supreme courts on federal constitutional questions.

113 As imposing obligatory duty

Since a constitution must be obeyed by the judiciary as well as the other departments of government, and the judges are sworn to support its provisions, courts are not at liberty to overlook or disregard its commands, or countenance evasions thereof. It is their duty in authorized proceedings to give effect to the existing constitution and to obey all constitutional provisions, irrespective of their opinion as to the wisdom or desirability of such provisions, and irrespective of the consequences. Thus, it is said that the courts should be, and are, alert to enforce the provisions of the constitution and guard against their infringement by legislative fiat or otherwise.

The duty of a court in a proper case to declare a law unconstitutional cannot be declined and must be performed in accordance with the deliberate judgment of the tribunal before which the validity of the enactment is directly drawn into question. However, a court generally should not reach the question of a statute's constitutionality when its unconstitutionality has not been placed at issue by one of the litigants in the case before it. Unless the statute as drawn is clearly unconstitutional on its face, it is preferred that the parties to the dispute uncover any constitutional defects in the statute through the dialectic of the adversarial system; for a court sua sponte to declare a statute unconstitutional is in derogation of the strong presumption of constitutionality accorded to legislative enactments.

When it is clear that a statute or ordinance transgresses the authority vested in a legislative body, it is the duty of the courts to declare the act unconstitutional, because they cannot shrink from it without violating their oaths of office. Once it is determined that a statute encroaches on constitutional limitations, the judicial department must not hesitate in condemning it. Thus, there rests upon the courts the affirmative duty of refusing to sustain that which by the constitution has been declared repugnant to public policy, [n34] and of supporting, protecting, and defending the constitution by giving effect to the provisions of the constitution, even if in so doing a statute is held to be inoperative. This duty of the courts to maintain the constitution as the fundamental law of the state cannot be evaded.

114 As solemn responsibility

The exercise of the right and power of judicial tribunals to declare whether enactments of the legislature exceed constitutional limitations and are invalid is one of the highest functions and authorities of the courts. It involves a grave responsibility and a solemn duty, and is at all times a matter of much delicacy. By way of contrast, however, courts also have a solemn duty to avoid passing upon the constitutionality of any law unless compelled to do so by an issue being squarely presented to and confronting the court in a particular case. Thus, courts should endeavor to implement the legislative intent of statutes and should avoid constitutional issues wherever possible.

115 Caution observed

The courts invariably give the most careful consideration to questions involving the interpretation and application of the constitution and approach constitutional questions with great deliberation, exercising their power in this respect with the greatest possible caution and even reluctance and ruling against the constitutionality of a statute only as a last resort, when absolutely necessary, when the legislation under review is in palpable conflict with some plain provision of the constitution, and where its invalidity is beyond reasonable doubt. When a federal court is asked to answer a constitutional question, the basic tenets of judicial restraint and separation of powers call upon it first to consider alternative grounds for resolution. A longstanding, widespread practice is not, as such, immune from constitutional scrutiny, but neither is it to be lightly brushed aside, and this is particularly so when the constitutional standard is as amorphous as the word "reasonable" and when customary and contemporary norms necessarily play a large role in the constitutional analysis. At the same time, there is no valid reason why a court, if it has jurisdiction of a constitutional question, should refuse to decide the question merely because it has some discretion in the matter whether to do so or not. Furthermore, a

court will not hesitate to decide the constitutionality of a statute where all other avenues of relief available to a party to the action are, at most, speculative.

116 By courts other than courts of last resort

The established principles regarding the duties of care and caution which the judiciary has imposed upon itself in exercising the judicial power to rule on the constitutionality of legislation have given rise to questions whether legislation is properly to be struck down on constitutional grounds by nisi prius and other courts of less than the highest rank. Although there seems to be no doubt that such inferior tribunals do not lack power to rule on constitutionality-of-legislation issues, courts of first instance are reluctant to exercise the power to declare an act of the legislature unconstitutional. In fact, a court of first instance ordinarily will assume a statute to be constitutional until otherwise determined by the higher courts (especially where the statute in question is one under which the court of last resort of the state has acted). But the question is an unsettled one, and there are holdings -- which appear to be better reasoned -- to the effect that the duty to determine a statute's constitutionality rests as much upon courts of the first instance as upon appellate courts.

Some Federal District Courts have refrained from invalidating acts of Congress, suggesting that this is more properly a function of the appellate courts; and the United States Supreme Court has suggested that a Federal District Court should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so. At times, there is even reluctance on the part of federal courts of appeals to declare acts of Congress unconstitutional. Where a Federal District Court has decided a constitutional claim based on a developed factual record, a Federal Court of Appeals exercises plenary review of the District Court's legal conclusion, but defers to the lower court's factual findings supporting that conclusion unless they are clearly erroneous.

117 Avoidance of unnecessary decisions

While most courts will not refuse to pass on the constitutionality of statutes in any proceeding in which such a determination is necessarily involved, they will not make a ruling on a matter of constitutional law where there is a lack of this necessary involvement or where some other basis for a decision is available; thus, needless consideration of attacks on the validity of statutes and unnecessary decisions striking them down should be avoided. This reluctance to decide constitutional issues except when absolutely necessary is sometimes referred to as the "doctrine of strict necessity," and flows from the unique place and character of judicial review of governmental actions for constitutionality under our American governmental structure.

The invariable practice of the courts is not to consider the constitutionality of legislation unless it is imperatively required, essential to the disposition of the case, and unavoidable. Thus, a court will inquire into the constitutionality of a statute only when and to the extent that a case before it requires entry upon that duty, and only to the extent that it is essential to the protection of the rights of the parties concerned.

118 Different provisions of same statute; severability

As a general rule, where a proceeding directly involves only one section of an act, it is not necessary to consider, and the court should not decide, questions raised as to the constitutionality of other provisions of the act not directly involved in the proceeding. However, where an unchallenged statute or portion thereof is not severable from an unconstitutional statute or portion thereof, the former will fail, regardless of its own constitutionality. Thus, one challenging the constitutionality of a statute on the basis of an objection to a part of a statute which is not involved in the case must show that the invalidity of the challenged portion renders the entire act unconstitutional or renders inoperative such portion of the act as does injuriously affect his or her rights. For example, where an argued severance would not relieve the harm complained of, courts may refuse to allow the severance argument to prevent the court from considering the constitutionality of the challenged statute.

Though it is improper to rule on the constitutionality of other statutory provisions that are not directly involved in a case, it is nonetheless a rule of construction that a court which has been requested to declare a statute unconstitutional should determine its constitutionality in the context of the whole statutory scheme of which it is a part.

119 Refusal to decide abstract, academic, or hypothetical constitutional questions

The constitutionality of a statute will not be considered and determined by the courts as a hypothetical question, because constitutional questions are not to be dealt with abstractly, speculatively, or in the manner of an academic discussion. Once a statute has been violated, however, and the person violating it alleges that it is unconstitutional, the question of its constitutionality is no longer abstract, academic, or hypothetical, and a court then properly may proceed to reach the question of its validity.

Economic injury, even if of an indirect nature, will establish sufficient concrete adverseness to meet the Federal Constitution's Article III "case or controversy" test. And a federal court has jurisdiction to determine the validity of a state law, even though no criminal prosecution has commenced as a result of the enforcement of such an act, if the record clearly shows that the plaintiffs face a real and genuine threat of prosecution. Furthermore, the voluntary cessation of allegedly illegal conduct does not deprive a federal tribunal of the power to hear and determine a case. The court's jurisdiction may abate if there is no reasonable expectation that alleged violations will recur and if intervening events have completely and irrevocably eradicated the effects of alleged violations; but to defeat jurisdiction on this basis, however, the defendants must offer more than their mere profession that the conduct has ceased and will not be revived, and unless such a guarantee is made, the plaintiffs are entitled to injunctive relief.

Observation: State courts, of course, are not bound by the "case or controversy" requirement governing federal courts, but remain free to fashion their own law of standing, consistent with notions of substantial justice and sound judicial administration.

120 Refusal to anticipate constitutional issues; prematurity or unripeness

Courts will not anticipate a constitutional issue in advance of the necessity of deciding it, or accept constitutional issues for adjudication when the controversy is "premature." And a state supreme court has held that a deputy sheriff's due process claim, in which he alleged that placement of a letter of reprimand in his file denied him a property interest in his continued employment by placing him at risk of subsequent deprivation, was rendered moot when the deputy voluntarily resigned his position.

On the other hand, where a prisoner had been released from prison, but where his release was conditioned upon his compliance with terms that significantly restricted his freedom, his case in which he alleged the unconstitutionality of an earlier denial of parole was held not yet moot, although there is contrary authority.

Observation: One court, while noting that there was an apparent conflict in authority on the issue of whether a claim that an earlier denial of release on parole was unconstitutional becomes moot upon subsequent parole of the prisoner with conditions, decided the issue could be addressed in any case because it was capable of repetition, yet evading review.

A political party's action challenging the constitutionality of a state's ballot-access restrictions was held not moot, as the complaint was one capable of repetition yet evading review, in that so long as the challenged statutory scheme remained in effect, the party might qualify for official party status under the "coat-tails" provision, but could be shut out of ballot access so long as it qualified without the necessary support to meet the signature requirements.

121 The substantiality doctrine

Federal courts are without power to entertain claims otherwise within their jurisdiction if they are so attenuated and insubstantial as to be absolutely devoid of merit. A claim is insubstantial only if its unsoundness so clearly results from the previous decisions as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy. Thus, trial courts are well advised to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the enactment of legislation when its constitutionality is under attack. However, where a class of activities is within the reach of federal regulation, such as through the commerce clause, courts have no power to excise individual instances as trivial.

Caution: The substantiality doctrine as a statement of jurisdictional principles affecting the power of the federal courts to adjudicate constitutional claims has been questioned, and was characterized in one case as "more ancient than analytically sound."

122 The abstention doctrine

Where a party has a choice between state and federal courts and chooses the federal court, the federal court may, under one version of abstention, order a stay of the proceedings, on the ground that if unsettled questions of state law are first decided, the settlement of those questions might end the controversy, and that therefore the decision of the federal questions involved should be deferred until the state law questions are decided in a state court.

Observation: The United States Supreme Court has described general categories of abstention that can be summarized as four major types: (1) when a federal court is presented with a federal constitutional question concerning the validity of state law, and there is a possibility that the state courts may interpret the challenged state law so as to eliminate, or at least materially alter, the constitutional question raised in federal court ("Pullman" abstention); (2) where there are presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or federal review of a state question would be disruptive of state

efforts to establish a coherent policy with respect to a matter of substantial public concern ("Burford" abstention); (3) where there is a pending state law enforcement proceeding, and the federal court does not intervene by injunctive or declaratory relief ("Younger" abstention); and (4) where a federal court exercises discretion to stay proceedings on its docket pending the outcome of a similar suit instituted earlier in state court ("Colorado River" abstention), although this one is not recognized by the Supreme Court as an abstention doctrine but as paralleling the abstention doctrines. Also, Congress has provided that the District Courts may decline to exercise supplemental jurisdiction over a claim that raises a novel or complex issue of state law, and this frequently is referred to as a form of abstention. Thus, federal courts have the power to refrain from hearing:

.Cases that would interfere with pending state criminal proceedings or with certain types of state civil proceedings;

.Cases in which the resolution of a federal constitutional question might be obviated if state courts were given the opportunity to interpret an ambiguous state law;

.Cases raising issues intimately involved with the states' sovereign prerogative, proper adjudication of which might be impaired by unsettled questions of state law;

.Cases whose resolution by a federal court might unnecessarily interfere with a state system for the collection of taxes; and

.Cases which are duplicative of a pending state proceeding.

Thus, for example, where a state statute or ordinance is challenged in a federal court as violating the Federal Constitution, but it has not yet been construed by the state courts, the proper procedure is for the federal court to hold the case in abeyance until the parties can secure from the state courts a decision upon the controlling question of state law. However, the abstention doctrine is inapplicable where no state court ruling on local law can settle the federal constitutional questions involved in the case, where a state court has already passed on the state issues involved, or where abstention would further delay already protracted litigation when combined with such circumstances as a failure of either party to request abstention, or the fact that the state statute in question was challenged in the abstract for vagueness. Also, in accordance with equitable principles, where no remedy in the state court is available to the complainant, a federal court taking jurisdiction over a matter concerning a state law alleged to be in contravention of the Federal Constitution should determine all the issues, both state and federal. A facial challenge to the constitutionality of a statute or ordinance regulating speech may be permitted as an exception to the abstention doctrine, even though the government authority is thus deprived of the chance to obtain a construction from a state court which would render the statute constitutional or to establish a local practice which would show it to be constitutional. In addition, when the unconstitutionality of a particular state action under challenge is clear, a federal court need not abstain from addressing the constitutional issue pending state court review. And it has further said that the abstention doctrine rarely should be invoked, because federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given them.

123 Unwillingness to adjudicate "political questions"

The United States Supreme Court has on a number of occasions refused to review constitutional issues where it concluded that the controversies were "political questions." However, there should be no dismissal for nonjusticiability on the ground of the presence of a political question, unless a case involves: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality for embarrassment from multifarious pronouncements by various departments on one question.

Nonjusticiable "political questions" have been held to include --

-- whether a particular form of government violates the guarantee of a republican form of government.

-- whether amendments to the Federal Constitution have been properly ratified.

-- whether a period of hostilities exist in which the United States is involved.

-- whether a particular group of Indians should be recognized as a tribe.

-- whether the United States Senate's rules for trying impeachment cases are appropriate and constitutional.

In determining if a question is a political question, the appropriateness under our system of government of attributing finality to the action of the political department and also the lack of satisfactory criteria for judicial determination are dominant considerations. Also, there will be a "political question" where "the need for finality in the political determination" is "dominant."

Observation: Since 1962, it is unlikely that suits against the states by either the United States or private parties raising constitutional issues are to be avoided as "political questions," for in that year the Supreme Court explained that the "political question" of abstention was a response to the doctrine of separation of powers applicable in the case of coordinate branches of the Federal Government. The court stated that it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question" of abstention, adding that the nonjusticiability of a political question is primarily a function of the separation of powers. Whether a state legislature has been malapportioned is thus a justiciable question rather than a political question, the Supreme Court has held, observing that the mere fact that the suit seeks protection of a political right does not mean it presents a political question. In another case, the Court has said that no political question is presented by the claim that congressional districts are malapportioned in a state. And the Court has also held that the political gerrymandering of congressional districts is not a political question, and that the courts may therefore hear such cases.

124 Foreign affairs

Controversies involving presidential and congressional handling of foreign affairs have often been deemed "political questions" not proper for judicial review. Thus, the Supreme Court would not decide whether a representative of a foreign government with whom the United States dealt in making a treaty was the proper representative of the foreign government. Nor would it review the executive decision on whether an individual was the proper representative of a foreign nation. The determination whether a new nation should be recognized has not been thought proper for judicial review. Whether a state of war exists between two foreign countries is for the Executive to decide, not the courts. Nor would the Supreme Court resolve the question whether a treaty had been broken. And the Supreme Court has refused to review the President's discretion not to award a license for foreign air flights by American firms.

Observation: Notwithstanding the foregoing older cases, the Supreme Court has more recently remarked that it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. In addition, the Supreme Court has held that it has jurisdiction to hear a suit seeking mandamus to require the Secretary of Commerce to certify that a particular foreign nation has exceeded international whaling quotas, despite the fact that the decision involved a political question. And one Federal District Court has held that prudential considerations did not dictate that taxpayers, who had a basis for constitutional standing, should be denied standing to bring a suit challenging, as a violation of the establishment clause, the appropriation and expenditure of public funds for construction, maintenance, and operation of religious schools abroad pursuant to the American Schools and Hospitals Abroad (ASHA) program, even though the plaintiffs' claims implicated "the sensitive area of foreign affairs."

125 The act of state doctrine

The act of state doctrine, under which the courts of one nation are precluded from inquiring into the of the public acts which another recognized sovereign power has committed within its own territory, has frequently been invoked by federal courts as a ground for refusal to hear or decide cases involving foreign nations. The act of state doctrine does not establish any exception to the obligation of United States courts to decide cases and controversies even if they may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions be deemed valid. It applies only to cases that would otherwise require courts to judge the validity of a foreign state's governmental acts in regard to matters within that country's borders. It does not apply to cases involving the nongovernmental or private acts of an individual who happens to be a foreign government official. While the doctrine does have "constitutional" underpinnings, it is not required by the Federal Constitution, nor is it compelled either by the inherent nature of sovereign authority or by some principle of international law; it was established through adjudications of the Supreme Court.

126 Resting decision on nonconstitutional grounds

It is settled as a general principle that courts will not pass on the constitutionality of an act of Congress or a state legislature if the merits of the case in hand may be fairly determined otherwise on nonconstitutional grounds. In other words, if a sufficient nonconstitutional ground for a decision is available, the court must begin and end there. This rule is followed even where such other grounds for decision have not been properly raised before the court by the parties, but have been raised by the court itself.

If the case may be decided on either one of two grounds and one of these does not involve the constitutionality of a statute or governmental action, the court must and will decide it on that ground; thus, where a party raises both statutory and constitutional arguments in support of a judgment, ordinarily courts will first address the statutory argument in order, if possible, to avoid an unnecessary resolution of the constitutional issue. This rule is applicable even if the constitutional claim can be resolved summarily whereas the nonconstitutional claim cannot be. Disposition of a constitutional question must be reserved to the last, when it is imperatively required or unavoidable.

When the validity of an act of Congress is drawn in question and a serious doubt of constitutionality is raised, the Supreme Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. However, the canon of construction that federal statutes are to be construed so as to avoid serious doubts of their constitutionality does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication. Furthermore, the fact that federal courts should not decide constitutional issues unnecessarily does not permit a court to press statutory construction to the point of disingenuous evasion to avoid a constitutional question.

127 Resting decision on alternative state grounds

Within the federal system itself, the rule has been established that federal courts should avoid adjudication of federal constitutional claims when alternative state grounds are available, and that where state constitutional provisions offer more expansive protection than the Federal Constitution, then federal courts must address the state constitutional claims first in order to avoid any unnecessary consideration of federal constitutional claims. State courts follow the same rule, considering state constitutional claims and issues before considering federal constitutional claims, reaching the latter only if necessary.

The Supreme Court also avoids constitutional decisions by vacating the decision below and remanding the case to the state court for further reflection and reconsideration. Similarly, cases from Federal District Courts have been vacated by the Supreme Court and remanded, with instructions to hold the case until there is a definitive state ruling; the Court has expressed the view that it is federal policy not to pass on constitutional questions in situations where an authoritative interpretation of state law may avoid the constitutional issues.

Observation: Since the federal "case or controversy" jurisdictional requirement, found in Article III of the Federal Constitution, does not apply to state courts, some states have laws requiring state courts to answer "certified questions" concerning the constitutionality of certain state statutes. Certified questions concerning the constitutionality of statutes almost inevitably conflict with the longstanding policy of judicial restraint in constitutional matters, since certified questions require the courts to make constitutional determinations, even though such cases could be resolved on other nonconstitutional grounds.

128 Limiting breadth of investigation and decision of constitutional issues

On a number of occasions, the Supreme Court of the United States has said that it will rigidly adhere to the policy never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Stated differently, in deciding constitutional issues, the Supreme Court has traditionally said that it will express its statement of constitutional principle controlling the decision in the narrowest language possible. This requires avoidance of "any constitutional question except with reference to the particular facts to which it is to be applied."

Courts should not go beyond the issues raised in order to decide momentous constitutional questions not contained within the framework of the pleadings or the evidence in the case. Similarly, they will view statutes whose constitutionality is in issue as being of a restricted scope, if decision of the constitutional question can thereby be avoided. And the courts will decline as a rule to decide whether a particular provision of a statute is unconstitutional where they are of the opinion that if such provision should in fact be invalid, it may be severed from the remaining provisions of a statute, the validity of which alone is necessarily before the court.

A decision sustaining the constitutionality of a statute is not decisive of its validity against subsequent attacks upon different grounds and does not preclude the court from subsequently declaring the statute unconstitutional where it is assailed upon other constitutional grounds. On the other hand, the rationale of rules of practice limiting the United States Supreme Court's determination of constitutionality of statutes may disappear where: (1) a particular statute has already been declared unconstitutional in the vast majority of its intended applications and it can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, in a mere fraction of the cases it was originally designed to cover; or (2) a state statute comes to the Supreme Court conclusively pronounced by a state court as having an otherwise valid provision of application inextricably tied up with an invalid one; or (3) the Supreme Court can justifi-

ably think itself able confidently to discern that Congress would not have desired its legislation to stand at all unless it could validly stand in its every application.

129 Generally

One whose rights are allegedly invaded by an act of Congress, a state legislature, or an administrative board must raise his or her objection at the earliest available opportunity and must exhaust any remedies which may have been provided for the correction of unreasonable and improper orders before he or she will be permitted to make an attack in the courts on the constitutionality of the statute or regulation. He or she must also raise the constitutional issue in a proper manner.

Usually, a court will not inquire into constitutional issues on its own motion. The courts have in general taken the view that a judge, even though it is his duty to interpret the laws, cannot, in a proceeding to compel the performance of some ministerial duty on his part, initiate the objection that a statute is unconstitutional where he has no personal interest involved and his duty does not require him to raise such defense. However, such a course is appropriate where the constitutional question, not raised until it was suggested by the appellate court, goes to the jurisdiction of the court below to entertain the proceedings in which the orders appealed from were entered.

The constitutionality of a statute or of an official action based on a statute is most frequently raised defensively. Thus, an interested party may, in general, attack the presumption of the constitutionality of a statute whenever such is material to the case and the statute has been applied or is about to be applied to deprive him or her of a constitutionally protected right. This is ordinarily done by demurrer, motion, plea, or other objection of some kind made in the trial court wherein the statute or ordinance is sought to be applied.

The types of legal proceedings in which constitutional questions may be raised are, for all practical purposes, limitless. In proper cases, the constitutionality of a statute may be tested by an action for declaratory relief, and constitutional issues may also be litigated in various actions at law, including contract and tort suits. Suits to recover paid taxes provide another frequent means of litigating constitutional issues.

A party aggrieved by a lower court's determination of a constitutional issue may have it reviewed by a higher court. The usual method of review is by appeal, and other forms of review are not ordinarily available where an appeal may be taken. But after an appeal to the highest state court, if the issue involves the Federal Constitution, the defendant may appeal directly to the United States Supreme Court, since no further review is available to him or her within the state.

Observation: Review of constitutional questions may also be available under statutes allowing a direct appeal to the Supreme Court from orders of three-judge courts granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit, or proceeding required by any Act of Congress to be heard and determined by a District Court of three judges, and authorizing the certification of any question of law in a civil or criminal case as to which instructions are desired from federal Courts of Appeals to the Supreme Court. Generally speaking, an intent to violate a state law is not relevant to determining standing, but a potential criminal liability as a result of such a violation is relevant to confer standing. And under the Federal Constitution and most state constitutions, standing to challenge the constitutionality of a statute or regulation requires a justiciable controversy and a real and immediate threat of injury.

130 Direct or collateral attack

Actions attacking the validity of a statute or ordinance generally must be brought by a direct suit for that purpose rather than by a collateral attack, in order to ensure due process of law. Thus, insofar as a university's actions in eliminating its men's swimming program while retaining its women's swimming program were taken in attempt to comply with federal civil rights laws, an equal protection attack on those actions by members of the men's swimming team was merely a collateral attack on the statute and its regulations and was therefore impermissible.

Normally, a failure to raise a constitutional issue on direct appeal will bar raising the issue in a collateral attack. However, constitutional claims can be raised for the first time in a collateral attack if a defendant can demonstrate a cause for the procedural default as well as actual prejudice from the failure to appeal. Collateral attacks on matters occurring in a foreign nation legitimately may be barred by treaty.

If a direct appeal or another avenue of collateral attack is created by a state, it must conform to due process standards. There is no constitutionally enshrined right to mount a collateral attack on a state court's judgment in the inferior Article III federal courts and, a fortiori, there is no mandate that state court judgments embracing questionable (or even erroneous) interpretations of the Federal Constitution be reviewed by the inferior Article III courts.

131 Raising question for first time on appeal

In general, the constitutionality of a statute cannot be raised for the first time in an appellate court or upon a rehearing in a civil case. However, public policy may justify the examination of constitutional issues that are not needed to dispose of the case. Further, an appellate court may decide a constitutional not been suggested, briefed, or argued in the court below when it is decisive of the case, especially where the unraised constitutional question relates to the jurisdiction of the court below to entertain the proceedings in which the orders appealed from were entered.

Practice guide: The United States Supreme Court does not have the power to consider whether a particular part of a state statute violates the Federal Constitution, in an appeal from a state criminal conviction where the constitutional question was not presented to the state courts in such a manner that it was necessarily determined by the state's highest court when it affirmed the conviction. On such an appeal, it will be assumed that the failure of the highest state court to pass upon a federal question was due to lack of proper presentation in the state court, unless the contrary is affirmatively shown. No particular form of presentation is required to draw the validity of a state statute into question before the state court, so as to give the United States Supreme Court jurisdiction to review an adverse decision, it being sufficient if the claim of invalidity and the ground therefore are brought to the attention of the state court.

Within the federal court system, standing, whether constitutional or prudential, is a jurisdictional issue which cannot be waived or conceded. Thus, a Federal Court of Appeals is bound to conduct an independent inquiry as to the plaintiffs' standing to challenge federal laws and regulations, even though the defendants have not challenged, and the District Court has not ruled on, the standing issue.

132 Declaratory judgments

Declaratory judgment actions have often been utilized to test the constitutionality of statutes and governmental practices. The Uniform Declaratory Judgments Act makes specific provision for determination of construction or validity of state statutes and municipal ordinances by declaratory judgment, and is considered to furnish a particularly appropriate method for the determination of controversies relative to the construction and validity of statutes and ordinances. In addition, the federal declaratory judgment power has been invoked frequently as a means of testing the constitutionality of congressional legislation. A plaintiff can have a declaratory judgment action on the constitutionality of either a federal or state statute by a single federal judge, so long as he or she does not ask to have the operation of the statute enjoined.

A court may not grant declaratory relief unless there is a "case or controversy" before the court -- that is, the dispute must consist of specific adverse claims, based upon present rather than future or speculative facts on which to base an adjudication.

A mere difference of opinion as to the constitutionality of legislation does not afford a basis for declaratory relief. Thus, a declaration construing a statute or ordinance and determining its validity will be made only where there is an actual controversy between the parties requiring the determination of this question. The Supreme Court is concerned with "cases" and "controversies" in reviewing declaratory judgment actions from both the state and the lower federal courts, so long as the legislation authorizing declaratory judgments and the practice of the courts restrict judicial action thereunder to "cases and controversies." Although, courts have, under the particular circumstances, entered declaratory judgments as to the validity of statutes, notwithstanding the apparent absence of a justiciable controversy, no such declaration will ordinarily be made in the absence of such an actual controversy. Thus, if one seeks a declaration in a civil suit as to the unconstitutionality of a statute under which he or she was convicted, and if the suit is brought out of merely academic curiosity about the constitutionality of the statute, then the kind of interest in the outcome of a suit that would support federal jurisdiction, consistently with Article III of the Constitution, is lacking. On the other hand, a plaintiff has standing to bring a declaratory judgment action in a real controversy involving a statute which he or she maintains is unconstitutional and which applies directly to himself or herself.

133 Advisory opinions

As a general rule, a state court is usually not authorized to render a merely advisory opinion, in the absence of a constitutional provision to the contrary. Thus, in most states, the courts will not give advisory opinions on constitutional or on any other kinds of issues not before the court as "cases" or "controversies." The rule is not changed by the fact that the request for an advisory opinion is made by the governor or the state legislature, at least in those states where the courts flatly refuse to render such opinions. However, there is no federal constitutional "case" or "controversy" applicable to the states, and thus states are free as a matter of their own procedural laws to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual "case" or "controversy" be presented for resolution.

In a minority of states, the courts will render advisory opinions, although these usually are given only under rare circumstances and under certain conditions. For instance, in one state, the state supreme court will render an advisory opinion only on narrow questions directed to specific provisions of the federal or state constitutions, or on issues regarding the constitutionality of pending legislation. In another, the Supreme Judicial Court will render advisory opinions only on important questions of law and on solemn occasions. A state supreme court may also generally refrain from advising the governor on issues that do not have any bearing upon a present constitutional duty presently awaiting performance by the governor.

In the case of the federal courts, the reason for the rule is quite clear: by the express terms of the Constitution, the exercise of federal judicial power is limited to actual "cases" and "controversies." Thus, federal courts are not authorized to issue advisory opinions under any circumstances.

Observation: A prior restraint on the exercise of First Amendment rights confers sufficient standing to challenge such statutes, and in such cases plaintiffs need not show that an actual injury has already occurred in order to challenge statutes or regulations imposing a burden on the exercise of First Amendment rights, which ruling, in effect, permits courts to render opinions in the nature of advisory opinions in this one area.

134 Extraordinary proceedings and writs

The question is often presented to the courts whether the constitutionality of legislation may be raised in extraordinary proceedings or through the use of extraordinary writs. In proper cases, the constitutionality of a statute may be tested by an action for declaratory relief or by use of the extraordinary writs of habeas corpus, injunction, mandamus, prohibition, or quo warranto.

135 Pleadings, briefs, and argument

Courts will not ordinarily pass upon constitutional questions which are not raised by the pleadings, although in some cases courts will review constitutional questions not raised by the pleadings in cases of plain error. Also, an appellant who fails to argue a constitutional contention in his or her brief, merely setting it forth in one sentence, is considered to have abandoned or waived such contention. The United States Supreme Court has said that it will not consider a constitutional question that was neither raised nor briefed nor argued before it. Similar authority is to be found in the decisions of state courts.

Although an act's unconstitutionality need not be pleaded with any greater definiteness or certainty than other issues, a party should, by proper averments, bring himself or herself within the scope of the act and show the feature of it which would be injurious.

Practice guide: Failure to raise the issue of the constitutionality of a statute below will normally preclude a court from considering the issue on appeal, but the court may sometimes decide to exercise its discretion to review an issue not raised below in exceptional cases or particular circumstances or when the rule would produce a plain miscarriage of justice.

136 Raising constitutional issue by demurrer

It is a fairly well-established rule that the constitutionality of a statute may be generally raised by demurrer, at least in those states that have retained the demurrer as a part of their procedural codes, although this is not necessarily considered to be the preferred way of raising constitutional challenges to the validity of statutes. The rule is more accurately stated as being that when a complaint states in form a cause of action resting upon a particular statute, the constitutionality of the statute may be raised by demurrer.

Practice guide: Where this mode of attack is employed, under the rule adopted by some of the courts, it is not necessary for the demurrer to specify the particular grounds on which the constitutionality of the statute is attacked, a general demurrer being sufficient for such a purpose. Other jurisdictions require a specific allegation in the demurrer stating how the law is repugnant to or in conflict with the constitution.

137 Motion for summary judgment

Where a genuine issue of fact must be resolved before the constitutionality of legislation can be decided, it has been held that a decision regarding the constitutionality of legislation will not be made on a motion for summary judgment, and this is particularly true where the issue to be decided is one of first impression and is not clear-cut and simple. Conversely, where a decision as to the constitutionality of legislation does not involve a finding on a genuine issue of fact, it has been held that such a decision may be made on motion for summary judgment.

138 Admissions and stipulations

In any determination as to the validity of legislation by an admission, agreement, or stipulation, the principle should be kept in mind that the constitutionality of any act is a question of law for the court, and not a matter of fact for a jury or

for private parties to decide. This question affects the rights of the public generally, as well as the rights of parties to a particular proceeding. For this reason, courts should be careful not to declare legislative acts unconstitutional on agreed and general statements and without the fullest disclosure of all material facts.

Stipulations that particular statutes of a state are invalid, as well as stipulations as to the steps taken in the passing of statutes and stipulations as to their construction, which in effect amount to stipulations of invalidity, are without binding effect. And the courts have consistently refused to allow litigants, either specifically or by admissive conduct, to agree privately as to the constitutionality of statutes. This principle has been expressed in the rule that a judgment of invalidity of a statute cannot be predicated on an admission. In other words, the court will not declare a statute to be unconstitutional because facts showing its unconstitutionality are alleged in the pleading of one party and admitted by the other.

The parties cannot stipulate as to the interpretation of a constitution. Thus, a stipulation that a particular provision of a constitution does not apply to the case will not bind the court.

139 Standing

It is always open to interested persons to show that the legislature has transgressed the limits of its power, and persons injuriously affected may question the validity of a law.

Practice guide: In order to establish standing to challenge a law as unconstitutional, an attorney generally must show that his or her client has suffered an actual or threatened distinct and palpable injury, there is a fairly traceable causal connection between the injury and the defendant's challenged conduct, and there is a substantial likelihood that the requested relief will redress or prevent the injury.

Even though a statute is unconstitutional, only those who have a right to raise a question of its unconstitutionality -- that is, those who have "standing" -- may invoke the aid of the courts to have it judicially set aside, and the constitutionality of a legislative act is open to attack only by those persons whose rights are affected thereby. This limitation on the ability of a plaintiff to assert the rights of third parties frees courts from making unnecessary pronouncements on constitutional issues and from premature interpretations of statutes in areas where their constitutional application might be cloudy and assures courts that the issues will be concrete and sharply presented; furthermore, prudential limitations on standing add to the constitutional minima a healthy concern that, if the claim is brought by someone other than the one at whom the constitutional protections are aimed, the claim will not be an abstract, generalized grievance that courts are neither well equipped nor well advised to adjudicate.

Before a law can be assailed by any person on the ground that it is unconstitutional, the person must show that he or she has, or belongs to a class which has, an interest in the question in that the enforcement of the law would be an infringement on his or her rights. The question of standing must be satisfied in every federal case and in almost every state case, and constitutional standing requirements apply at trial as well as on appeal. A party's subjective fear that he or she may be prosecuted for engaging in certain expressive activities is not an injury for standing purposes unless that fear is objectively reasonable. Assailants must therefore show the applicability of the statute to them and that they are thereby injuriously and directly affected, and a statute will not be struck down unless the plaintiffs are actually aggrieved and prejudiced by its enforcement. Thus, for example, unincorporated associations and individuals do not have standing to bring a Second Amendment challenge against statutory provisions prohibiting the manufacture, transfer, or possession of new semiautomatic assault weapons where they had not violated the law and did not face a genuine threat of prosecution under the law, although where a statute in effect singles out the appellants as its intended targets, by prohibiting weapons that only the appellants make, standing has been found. These "standing" rules, which are not to be applied mechanically, are applicable to all cases both at law and in equity, to attacks on ordinances, and to criminal proceedings.

The corollary to the general rule is that one who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality. Absent a showing of injury, actual or threatened, there can be no constitutional argument.

140 Facial constitutional challenges; overbreadth

Ordinarily, a litigant cannot pursue or sustain a facial constitutional challenge to a law if that law is constitutional in its application to that litigant, inasmuch as a "facial challenge" to a law is a challenge based on a contention that the law, by its own terms, always operates unconstitutionally.

There is one important exception to this rule, referred to as the First Amendment "doctrine of substantial overbreadth," which allows a person to whom a statute may be constitutionally applied to challenge the statute on the ground that it may be unconstitutionally applied to others.

Caution: The overbreadth doctrine may give one standing to challenge the constitutionality of a statute which is not unconstitutional as applied, but which may be unconstitutional in some cases in order to protect the right of free speech. However, it is important to understand that the overbreadth doctrine is available only in the area of free speech. It does not afford standing to a plaintiff who does not claim any violation of First Amendment rights. Further, it does not apply to commercial speech challenges, and has no applicability in other constitutional areas, such as in cases involving due process violations. In addition, the doctrine should be applied sparingly and used only as a last resort. And for it to apply, there must be a realistic danger that the statute will significantly compromise the recognized First Amendment rights of persons not before the court for the statute to be challenged on overbreadth grounds.

141 Article III case or controversy requirement

Article III of the Federal Constitution does not confer on litigants an absolute right to the plenary consideration of every nature of every claim by an Article III court. Because the exercise of judicial power under Article III of the Constitution depends on the existence of a case or controversy, persons seeking to invoke the jurisdiction of a federal court must establish the requisite standing to sue before the federal court can consider the merits of the legal claim, for Article III gives federal courts jurisdiction only over "cases and controversies" and the doctrine of standing serves to identify those disputes which can be appropriately resolved through the judicial process. The question whether a party has standing to maintain in a federal court an action challenging the constitutionality of a statute on the ground that it violates the Federal Constitution is to be determined by federal law.

Caution: While some courts have held that Article III standing may be conferred by statute, the Supreme Court has held that there is an irreducible constitutional minimum of standing, requiring that (1) the plaintiff have suffered an injury in fact, which is an invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical; (2) there be a causal connection between the injury and conduct complained of so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court; and (3) it be likely, as opposed to merely speculative, that injury will be redressed by a favorable decision.

142 "Injury-in-fact" requirement

In equal protection cases, persons are required to show that they have been in fact injured in order to have standing to challenge the validity of laws that apply to them. The "injury-in-fact" required for standing in an equal protection case is a denial of equal treatment resulting from the imposition of a barrier, not necessarily the ultimate inability to obtain the benefit.

The "zone of interest test" is the guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of particular agency decision; in cases where the plaintiff is not itself subject of contested regulatory action, this test denies the right of review if plaintiff's interests are so marginally related to or inconsistent with purposes implicit in statute that it cannot reasonably be assumed that Congress intended to permit suit.

Despite the foregoing rule in equal protection cases, an exception to the "injury in fact" requirement for standing applies in First Amendment cases.

143 Nature of interest required

Persons wishing to contest, on constitutional grounds, the validity of legislation must be able to show, not only that the legislation is invalid, but also that they have sustained, or are in immediate danger of sustaining, some direct injury as the result of its enforcement, and not merely that they suffer in some indefinite way in common with people generally. A plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy. Thus, a person cannot attack as unconstitutional a statute or provision of a statute not applicable to his or her particular situation.

Observation: The rule against standing for those parties with only generalized grievances applies with as much force in an equal protection context as in any other; thus, in order to have standing to raise an equal protection argument, there must be an injury in fact to the defendant, not some remote threat of injury or injury to another class of which he or she is not a member. Therefore, even if a governmental action is discriminatory on the basis of race, the resulting injury affords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct. As an example, a white defendant would not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury foremen, as he would not be of the same race or "identifiable group" as those he alleged were being excluded from serving.

The power of courts to pass upon the constitutionality of statutes arises only when the interests of litigants require the use of judicial authority for their protection against an actual or threatened interference; a hypothetical threat is not enough.

Practice guide: The interest which is requisite to standing to question the constitutionality of a statute or ordinance is a direct, substantial, real and immediate, not conjectural or hypothetical, personal contractual, financial, or property interest.

There must also be a legal right or interest, although the existence or nonexistence of a legal interest in the matter in controversy has been said to be a matter quite distinct from the problem of standing to sue. The rule is frequently stated that to raise a constitutional question, one must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right, and one who attacks a statute on the ground that it deprives him of his constitutional rights has the burden of proving that his rights have been invaded by the actual or threatened application of the challenged law. A plaintiff in a federal court must show a logical nexus between the status asserted and the claim sought to be adjudicated, such inquiries being essential to insure that he is a proper and appropriate party to invoke the federal judicial power. Thus, a shareholder of a corporation located in one state does not have standing to bring a claim that the operation of another state's "local product and vendor preference" scheme for that state's procurement bidding process violates the privileges and immunities clause, where the injury to the shareholder is merely derivative of the injury to the corporation, which is not constitutionally cognizable under the privileges and immunities clause.

144 Direct interest

To meet the test of interest requisite to challenging the constitutionality of legislation, the persons or entities seeking to make the challenge must show that they are directly affected by the legislation in question. Thus, for example, a pawnbroker has standing to assert a due process challenge to the seizure and disposition of pawned property in his or her possession. Even though a person may come within the main purpose of a statute, he has no standing to raise constitutional questions which do not directly affect him or which affect third parties, for unless a party can show that he himself has been wrongfully included in the terms of a law, he can have no just ground of complaint. A litigant can be heard to question the validity of a statute only when and insofar as it is applied to his or her disadvantage.

Observation: These rules also apply to business entities. Thus, for example, foreign corporations which were the sole shareholders of domestic corporations conducting business in California had Article III standing to challenge in federal court, on foreign commerce clause grounds, the accounting method by which California determined the locally taxable income of its subsidiaries on the ground that judicial determination that the state board's accounting method was unconstitutional would prevent an actual and direct financial injury to such corporations that would have been caused by the tax illegally reducing the return on their investments in their subsidiaries and lowering the value of their stockholdings.

145 Personal interest

A person ordinarily cannot challenge the constitutionality of a statute unless he or she shows that he or she is personally injured by its operation. In other words, constitutional rights are personal and may not be asserted vicariously. The gist of the question of a party's standing to maintain in a federal court an action challenging the validity of a statute on the ground that it violates the Federal Constitution is whether he alleges such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for the illumination of difficult constitutional questions.

Three constitutional standing requirements, which stem from separation of powers principles, are: (1) the plaintiff must have suffered an injury in fact which is concrete and particularized as to the plaintiff and actual rather than hypothetical; (2) that the injury must be fairly traceable to the defendant's challenged conduct and not caused by an independent action of a third party; and (3) the injury must likely, not possibly, be redressable by favorable decision in litigation. Thus, a party has standing to challenge the constitutionality of a statute where the requisite test of personal injury is satisfied.

Observation: Enforcement of the establishment of religion clause does not demand any special exception from the requirement that a plaintiff allege a distinct and palpable personal injury that is likely to be redressed if the requested relief is granted.

One against whom no attempt has been made to apply or enforce a statute may not challenge its constitutionality, and an accused cannot raise the question of the constitutionality of a statute which is not the basis of the prosecution against

him. Similarly, the constitutionality of a statute will not be considered where it is construed as inapplicable, or no longer applicable, to the one who has raised the constitutional question.

The United States Supreme Court has said that, to limit the breadth of issues which must be dealt with in particular litigation, it generally insists that parties rely only on constitutional rights which are personal to themselves, this being related to the broader doctrine that constitutional adjudication should, where possible, be avoided. But since the rule that a plaintiff must assert his or her own right is only a rule of practice, it can and should be disregarded whenever necessary for the more effective attainment of justice. The Supreme Court has indicated that the usual rule will be "outweighed by the need to protect fundamental rights."

146 Interests of third parties

As a general rule, no one can obtain a decision as to the invalidity of a law on the ground that it impairs the rights of others. Various factors may justify departure from the general rule that ordinarily a litigant lacks standing to assert the rights of third persons in challenging the constitutionality of legislation, such as where a close relationship exists between the rights of the litigant and the rights of the third party, or where the third party is unable to assert his or her own rights, or in cases involving First Amendment rights. Thus, a litigant may raise a constitutional claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury; the injury is real and not speculative; he or she has a close relationship with the third party; and there exists some hindrance to the third-party's ability to protect his or her own interests. For example, the attorney for a defendant whose assets, needed to pay the attorney's fee, were forfeited has standing to advance the defendant's Sixth Amendment rights because the attorney had a stake in the forfeited assets and it was credibly alleged that the forfeiture statute at issue might materially impair the ability of persons in the defendant's position to exercise their constitutional rights.

147 Interest requisite to challenging legislation as discriminating against, or in favor of, a class

In cases in which legislation is attacked as unconstitutionally discriminating against a particular class, the rule as to the requisite interest of the party complaining is that where the class which includes that party is in no manner prejudiced, it is immaterial whether the law discriminates against other classes or denies to other persons equal protection of the laws. One cannot assert theoretical inequalities in a statute when he or she is not affected by the discrimination which allegedly exists. One cannot complain of the possible unequal operation of a statute on others less favorably situated than he or she is. And one who engages in some sort of conduct that is clearly proscribed by a statute cannot complain of the vagueness of the law as applied to the conduct of others. Thus, when the vice of a statute is its vagueness, a litigant asserting the vagueness defense must demonstrate that the statute is vague as applied to the litigant's conduct without regard to its potentially vague application to others.

Stated differently, the rule of fundamental importance is that a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he or she belongs to the class which is prejudiced by the statute.

It is not enough simply to show discrimination; it also must appear that the alleged discriminatory provisions operate to the hurt of the person complaining or adversely affect his rights or put him to disadvantage. Thus, for example, although the accused was not a physician or pharmacist and was not an unmarried person denied access to contraceptives, it was held that he had standing to assert the rights of unmarried persons denied access to contraceptives where he had been convicted of violating a state statute making it a crime to sell, lend, or give away any contraceptive. And medical doctors were held to have standing to attack a statute limiting abortions and exposing them to criminal prosecutions. [n53] But standing was denied to indigent plaintiffs and group plaintiffs contesting an Internal Revenue Service ruling allowing favorable tax treatment to a hospital that offered only emergency treatment to indigents. And standing to challenge a town's zoning law, alleged to have the purpose and effect of excluding low and moderate income and minority persons, was denied to nonresident low and moderate income minority persons, as well as to taxpayers of a neighboring city and to several associations, including one of residential construction firms. Similarly, persons who made no claim that they were recently arrived residents of a state, or that they had moved from one county to another, or even that they had changed their residence at all, lacked standing to raise contentions that a state's durational residence requirements for voting in primary elections violated the equal protection clause and the constitutional right of interstate travel; such persons could not represent a class to which they did not belong.

It is, of course, also unconstitutional to unlawfully discriminate in favor of a class or group in violation of the equal protection clause. One who is not a member of the unlawfully disfavored class or group does not have a sufficient interest to challenge the statute creating the unlawful status. Thus, a nonreligious publication, subject to a state sales tax on the

sale of publications in general, has been held to have standing to attack as unconstitutional an exemption from the state sales tax granted to the favored class of religious periodicals.

148 Standing of organizations and groups to represent their own interests

Groups and organizations, including unions, commissions, and associations, can have legitimate legal interests of their own that are sufficient to give them standing under customary rules. For example, a number of groups listed as "Communist" by the Attorney General were held to have standing to attack the constitutionality of the federal action. Similarly, the National Association for the Advancement of Colored People (NAACP) was held to have standing to attack the constitutionality of a state statute requiring the production of membership lists in unincorporated associations and a state statute limiting its litigational activities. An organization concerned with the operation of the District of Columbia area airports was held to have standing to challenge the constitutionality of the creation of a board consisting of members of Congress with veto power over its decisions. A group of state bar members had standing to challenge rules governing attorney advertising. And a mining association had constitutional standing to represent its members to challenge a government regulation.

To have standing, the group or association seeking review must have suffered an injury to its own interests. Thus, an environmental protection club was held not to have standing to litigate environmental issues where it failed to allege that it was adversely affected by a proposed governmental action. And the concern of welfare rights groups for adequate hospital services for the poor was held not enough to justify standing to attack an Internal Revenue Service ruling allowing favorable tax treatment to a hospital that offered only emergency service to indigents. For the same reasons, labor organizations, a teachers' association, a veterans' organization, a real estate board, an association of private clubs, a market association, and a chiropractors' association were denied standing to raise constitutional issues because their organizational rights, as opposed to the rights of their individual members, were not affected by the operation of certain statutes or governmental actions.

149 Standing of organizations and groups to represent the interests of their members

A group can also have standing as the representative of its members, provided that it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit. Thus, the NAACP has been held to have standing to assert the constitutional rights of its members. An Indian tribe was an appropriate entity to pursue federal acknowledgment on behalf of its members which it claimed had been unconstitutionally denied to them by a federal statute. A religious foundation had standing to raise the free exercise claims of its workers in connection with a Fair Labor Standards Act action where the workers were members of the religious organization as well as employees under the Act. A nonprofit organization representing registered nurses in Guam had standing to challenge the constitutionality of an antiabortion statute, since the nurses would have been subject to prosecution for assisting during an abortion procedure. An association of general contractors had standing to assert an equal protection challenge to a city ordinance according preferential treatment to certain minority-owned businesses in the award of city contracts, even though the association did not show that one of its members would have received a contract, absent the ordinance. A labor union had representational standing to protect the rights of its members to press a claim that the Federal Aviation Administration's alcohol and drug testing regulations did not afford procedural due process in accordance with the Fifth Amendment, as well as having representational standing to challenge a regulation regarding the recognition of Mexican truck drivers' commercial licenses to drive in the United States.

There are additional instances in which other groups have been given standing to represent the constitutional rights of their members. For instance, a legal ethics committee had standing, in an attorney disciplinary proceeding arising from the attorney's alleged violation of the fee requirements of the Black Lung Benefits Act, to argue for the validity of such requirements as not unconstitutionally depriving black lung benefit claimants of their right to legal representation. Various local boards of education and school children represented by their parents had standing to challenge the constitutionality of the statutory scheme under which the public education system receives its fiscal support. A nonprofit theatrical organization which sought to reach out and involve black and Hispanic communities had standing to challenge a denial of funding by the county on the basis of race since the organization was in a better position than anyone else to challenge discriminatory practices leading to the cutting of its funds.

Caution: A mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render an organization adversely affected or aggrieved for the purpose of giving it standing to obtain judicial review, particularly in situations where the claim asserted is one that ordinarily requires the participation of individual members for a proper understanding and resolution of the claim. And an organization ordinarily does not have standing to represent its members where the organization is challenging a statute that has no rational link to the organization's purpose.

150 Individuals championing class

A member of a particular class which may be discriminated against does not necessarily have the right to champion any grievance of that entire class in the absence of any actual interest which is prejudiced or impaired by the statute in question. Only someone who shows that he or she is injured may complain; ordinarily, the person cannot champion others who do not choose to complain. But if one's own legal or property rights are affected by the operation of a law, he or she may assail it, even though in doing so he or she also champions a particular group's rights. Thus, a physician who demonstrates that abortion funding regulations have a direct financial impact on his practice may assert the constitutional right of other individuals who are unable to assert those rights themselves. And the mother of an illegitimate child had standing to seek redress for her claim that New York's statutory scheme governing the modification of child support agreements violated the equal protection rights of all illegitimate children and their parents within the state.

The rule that to have standing to litigate a constitutional question one must be asserting the right in his or her own behalf is only a rule of practice which may be outweighed by the need to protect fundamental rights; that need in turn may prompt courts on grounds of broad constitutional policy to proceed without blind adherence to technical rules of representation. Thus, the Supreme Court in "unique situations" will disregard its usual rule denying standing to raise another's rights. "Unique circumstances" will most readily be found where "fundamental rights" would otherwise be denied, and where, if standing to the instant plaintiff were denied, the possessor of the constitutional right would "have no adequate remedy" to vindicate his or her right or "it would be difficult if not impossible for the person whose rights are asserted to present their grievance before any court;" in this situation the reasons underlying the rule denying standing to raise another's right -- which is only a rule of practice -- are outweighed by the need to protect fundamental rights. For example, the Supreme Court granted standing to doctors to attack a statute excluding abortions not "medically indicated" from Medicaid benefits to needy persons, thus allowing them to litigate the rights of their patients. And an attorney against whom a disciplinary proceeding was brought for allegedly collecting illegal fees in black lung benefit cases had standing to object to the constitutionality of the attorney fee provisions of the Black Lung Benefits Act, as allegedly depriving black lung benefit claimants of their due process right to legal representation in such cases. But a prison inmate was held to lack standing to assert the free speech rights of prison guards relative to a prison policy prohibiting the guards from communicating directly with the parole board on behalf of the prisoners, as the interests of the prisoner and the guards were not aligned, and no evidence was presented of the guards' inability to protect their own rights.

151 States or the United States

The United States has standing to challenge state laws or rules that contradict or contravene federal laws or practices.

In the United States, the states have no general standing before the United States Supreme Court to attack laws passed by Congress. Article III of the Federal Constitution, which gives the Supreme Court original jurisdiction over suits in which a state is a party, does not automatically give the states standing to litigate federal constitutional issues. A state does have standing to sue in its capacity as parens patriae to prevent or repair harm under its quasi-sovereign interest in protecting the welfare of its citizens. The asserted quasi-sovereign interest will be deemed sufficiently implicated to support parens patriae standing if the injury alleged affects the general population of the state in a substantial way. The general population need not be directly affected, for even where the direct injury is to fairly narrow the class of persons, there is still precedent for finding state standing on the basis of substantial economic effects on its general population. In other situations, however, states are customarily held to the usual requirements of standing. States do have standing to defend the constitutionality of their own statutes, however.

A state cannot maintain a bill for an injunction against federal officers charged with the administration of a federal statute which did not show that any justiciable right of the state was being, or was about to be, affected prejudicially by the application of the statute, but which, in effect, sought merely to obtain an abstract judicial declaration that, in certain features, the statute exceeded the authority of Congress and encroached upon that of the states. Also, a state, even as parens patriae, cannot have standing to attack an act of the federal Congress. The states will ordinarily not have standing when they seek to protect their people from the operation of federal statutes, such as the federal inheritance tax law. The Supreme Court has also denied a state the right to file a complaint attacking the constitutionality of the United States' participation in the Vietnam Conflict. And a state does not have standing to assert the voting rights of its citizens.

States, like other parties, can raise federal constitutional issues when their property rights are directly affected by legislation of the Congress or by other federal action, by legislative or other action of another state, or by private parties or entities.

States as "parens patriae" or "quasi-sovereign" have at times been given standing in the federal courts to protect a large number of their citizens from activities of other states as well as private individuals which were harmful to the health, safety, or welfare of their citizens.

States do have standing to assert rights given to them, or assigned only to them, under the Federal Constitution. Thus, states have standing to sue for the purpose of showing legal injury when the right to bear arms is infringed. A state was held to have standing to raise the constitutionality of a statute which prohibited an indigent defendant from waiving counsel in a capital case where such statute, if valid, would defeat the state's right to carry out a judgment against the defendant. And a state has standing to challenge a criminal defendant's racially discriminatory use of peremptory challenges and to assert the excluded jurors' rights, since the state suffered a concrete injury from the undermined fairness and integrity of its own judicial process and had a close relationship to potential jurors as representative of all citizens, and since the barriers to a suit by the excluded jurors were daunting.

152 Political subdivisions

As a general rule, political subdivisions of the state are held to lack standing, either as parens patriae or to vindicate "rights" of their own, to challenge the constitutionality of state laws directing or involving their performance. This rule has been applied to cities, counties, towns, villages, boroughs, sanitation districts, and school districts.

Despite the foregoing, the standing of a political subdivision to challenge the constitutionality of statutes has been recognized where the legislation affects its ownership of property, or involves a question of substantial public interest to its citizens, or enlarges an expressly defined statutory duty. Thus, a local unit of government had standing to challenge, under the Tenth Amendment, a federal statutory requirement that chief law enforcement officers conduct background checks of persons wishing to purchase handguns, even though the state, which created the local entity, failed to join in the challenge. And where the contention of the local government was that a statute violated the home-rule guarantees of the state constitution, it was held that there should be a limited exception to the rule that a local government is without standing to attack the constitutionality of state legislation affecting its powers. A city has even been held to have standing to contest the constitutionality of a provision of its own charter.

153 Public officials

Under the general principle that the constitutionality of a statute cannot be questioned by one whose rights are not affected thereby and who has no interest in defeating it, a public official generally does not have such an interest as would entitle him or her to question the constitutionality of a statute and to refuse to comply with its provisions. Thus, it has been held that a ministerial official cannot question the constitutionality of a statute fixing his ministerial duties, since the interest of such officer is official, not personal. This is especially true of subordinate officials. If the duty to act devolves on a superior officer who directs one of his or her subordinates to perform the act, the general rule is that such subordinate may not in effect review the decision and order of his or her superior and refuse to act merely on the ground that the law is unconstitutional. Under such circumstances, the superior, and not the subordinate, is responsible for the official act in question.

The rule that public officials may not contest the validity of a statute is not an inflexible one. It is subject to the qualification that in any case in which an officer might be held personally liable for his or her acts, the officer has such an interest as entitles him or her to question the constitutionality of the statute, unless a court of competent jurisdiction has previously entered a judgment declaring the enactment valid. And a public official has a right to have the court determine whether a change in his or her duties has been legally effected. Also, the courts have recognized that a question of general and vital public interest may be raised by a public officer. Moreover, an official may raise constitutional questions where he can show that his personal or property rights are adversely affected by the operation of the statute, or that his administration of the act in question will require the expenditure of public funds.

154 Members of Congress or state legislators

Members of Congress and state legislators have no special standing, by virtue of their position, to challenge the constitutionality of congressional or legislative action. However, in accord with the general rule concerning the type of interest necessary for standing, a legislator does have standing to challenge the constitutionality of legislation if such legislator has a direct or personal stake or interest in the matter. Thus, for instance, a member of Congress, as an employee of the United States government, had standing to challenge the operation of a law that set up the mechanism for the annual cost of living adjustment for members of Congress and which established the quadrennial pay raise system. And legislators, as legislators, are granted standing to challenge executive actions when specific powers unique to their functions under the state constitution are diminished or interfered with; however, once the votes which they are entitled to make have been cast and duly counted, their interest as legislators ceases, and some other nexus must then be found to chal-

lenge the allegedly unlawful action. However, a legislator, who is also a member of the state bar, does not have standing to assert that a rule regarding the confidentiality of disciplinary proceedings constitutes an unreasonable restriction of speech in violation of the First Amendment, where the claimant or participant in a disciplinary proceeding can assert his or her rights in an independent action and where the legislature can assert its rights which the participants not before the court might not wish to assert.

155 Taxpayers

Generally speaking, a person who pays taxes or is liable to pay taxes for the support of a taxing unit and who would be injured by the unlawful expenditure of public funds, by the illegal disposition of the public property of such taxing unit, or by any other illegal act which would increase his or her burden of taxation, is entitled to institute and maintain a taxpayer's action, regardless of the amount or kind of taxes that he or she pays. Thus, a tax-paying member of a state legislature has standing to challenge the constitutionality of the practice of beginning each legislative session with a prayer offered by a chaplain paid out of public funds.

However, as a general rule, private citizens who seek to restrain official acts must allege and prove some damage to themselves different in character from that sustained by the public generally. Ordinarily, the mere status of one as a taxpayer is not sufficient to qualify him or her to institute a taxpayer's action. The rule is that the taxpayer must have a pecuniary interest in the subject of the action and must show that the acts complained of will result in some pecuniary loss or other injury to his or her property or interests as a taxpayer and to taxpayers as a class, through increased taxation and the consequences thereof, or in some financial loss or injury to the municipal corporation or other governmental unit on behalf of which he or she institutes the action, and in the absence of such a showing of direct pecuniary injury by the taxpayer, no justiciable case or controversy exists. Thus, a taxpayer who was not herself impeded from traveling to or settling in California by that state's property tax system which she challenged, and who did not identify any obstacle preventing others who wished to travel to or settle in California from asserting claims on their own behalf, could not have the tax system subjected to heightened scrutiny on the basis that the system violated the constitutional right to travel. Taxpayers who sought to be excluded from the self-employment tax under exemptions for ministers and members of religious orders, and members of certain religious faiths lacked standing to contend that these exemptions violated both the establishment and free exercise clauses of the First Amendment, because the taxpayers cannot fall within the exemptions if those sections are held unconstitutional under the First Amendment, and thus their alleged injury cannot be redressed by a favorable decision. And a group of 5,000 taxpayers lacked standing to challenge the alleged failure of the Internal Revenue Service to comply with various constitutional and statutory requirements in its tax collection efforts, absent any statement identifying any claimant as having personally suffered from the alleged conduct complained of or anything more than some remote and conjectural allegations of injuries.

However, federal taxpayers have standing to raise Establishment Clause claims against exercises of congressional power under the taxing and spending power of Article I ß 8, of the Constitution, so that, for example, federal taxpayers can challenge federal statutes which authorize grants to public or nonprofit private organizations or agencies for services and research in the area of premarital adolescent sexual relations and pregnancy, including religious and charitable organizations, voluntary associations, and other groups in the private sector, as well as governmental agencies, and which restrict the use of funds in various ways, including a ban on the use of funds to provide family planning services or promote abortion. Furthermore, the Court has held that taxpayers had standing to raise an establishment clause challenge to school district programs which provided classes to nonpublic school students at public expense in classrooms located in and leased from nonpublic schools.

An exception to the general rule that an individual taxpayer, to challenge a statute's constitutionality under the equal protection clause, must show that the alleged unconstitutional feature of statute injures him and so operates to deprive him of a constitutional right, exists when the individual taxpayer seeks to enjoin an illegal act by a municipal body.

156 Corporations and other business entities

Corporations and other business entities can have legitimate legal interests of their own that are sufficient to give them standing under customary rules. An insurance company had standing to challenge the federal regulations which provided that Medicare payments would not be made for services covered by an automobile insurance policy, even though the policy stated that its benefits were secondary to Medicare since: (1) the company would suffer large financial losses because it would be required to make unanticipated payments on claims arising under previously issued policies; and (2) the rights asserted by the company in connection with such economic obligations were within the zone of interest entitled to constitutional protection. And some retail liquor stores had standing to bring a suit against a state seeking a declaration that a statute prohibiting the advertisement of liquor prices unconstitutionally violated the group's First

Amendment speech rights. However, a corporation was held to lack standing to challenge a requirement of a state's video lottery statute that a majority interest of any corporate applicant must be owned by state residents. And a bank was held to lack standing to assert the due process rights of its depositors.

157 Citizens, residents, and aliens

A mere citizen, as such, has no right to raise the question of the constitutionality of a statute, in the absence of a showing of direct injury. Thus, he or she may not complain about the legality of expenditures of public funds, or contest the policies of prosecuting authorities when he himself is neither being prosecuted nor threatened with prosecution, or attack the practice of some members of Congress in holding reserve commissions in the military, in an alleged violation of a provision of the United States Constitution. Citizens have no standing to assert constitutional rights that apply only to states. And the parents of black children attending public schools in districts undergoing desegregation were held to lack standing to challenge Internal Revenue Service procedures and rulings denying tax-exempt status to racially discriminatory private schools. However, the citizens of a state who do not own real property have Article III standing to challenge, under the equal protection clause, a state law requirement that one own real property in order to serve on a government board.

Citizens who alleged that a large Latin cross, which had been erected on a butte in a city park, prevented them from freely using the area on and around the butte had standing to bring an action alleging that the city's ownership and display of the cross violated the establishment clause. And a United States citizen, who wished to use and exhibit Canadian films termed "political propaganda" under federal law was held to have standing to bring an action challenging the constitutionality of the use of the phrase "political propaganda" in the statute, since the citizen's personal, political, and professional reputation would suffer from the use of the phrase if he exhibited films labeled as "political propaganda."

Similarly, residents of a state or particular area have no special status to challenge the constitutionality of legislation not affecting them directly. Thus, residents of a state or city cannot attack the constitutionality of a statute or ordinance on the ground that it discriminates against nonresidents. But residents of a state earning income while working in another state have standing to challenge the constitutionality of a commuter's income tax enacted by the other state, even though the state of residence provides a credit for any taxes paid to foreign jurisdictions. State residents who faced penalties for failure to pay an allegedly unconstitutional impact fee on vehicles purchased or titled out-of-state but subsequently registered in-state by state residents had standing to challenge the constitutionality of the fee, even though they had either not paid the fee or had not requested a refund. And residents have standing to challenge the legality of territorial restrictions imposed by statutes on the taking and catching of crabs and oysters, since such restrictions would have a severe economic effect on them.

An alien has no right to raise the constitutional question of immunities and prerogatives pertaining solely to citizens of the state. Nor does a nonresident alien have a right to invoke the equal protection and due process clauses of the Constitution, which, due to their territorial nature, apply solely to citizens and resident aliens. However, resident aliens have been held to have standing to challenge the constitutionality of a state education law provision requiring that applicants for scholarships and tuition assistance awards be United States citizens or be persons who intend to become citizens.

158 Physicians and other health professionals

A physician has standing to challenge an abortion law that poses for him or her a threat of criminal prosecution. A physician also has standing to challenge a state statute prohibiting him from aiding another person to commit suicide, inasmuch as the doctor ran a severe risk of prosecution under the statute, which proscribed the conduct in which he sought to engage. Aspiring midwives had standing to bring a substantive due process challenge to a licensing statute regulating the practice of midwifery; because the statutory requirements allegedly made it more difficult for aspiring midwives to practice their chosen profession, they established an "injury in fact." But a dentist who had clearly engaged in "dishonorable" conduct by sending letters to his patients misrepresenting the nature of the Board of Dental Examiners' action against his partner in an attempt to retain patronage was precluded from claiming that the statute providing for the suspension or revocation of a dentist's license for "dishonorable or unprofessional conduct in practice of dentistry" was unconstitutionally vague. And a patient who brought a medical malpractice action against a qualified health care provider, which was subject to a three-year statute of repose under the state's medical malpractice act, lacked standing to raise an equal protection challenge to the classification scheme between classes of health care providers under the statute, since the patient was not acting as a health care provider, and the classification did not implicate the equal protection rights of medical malpractice plaintiffs.

159 Voters

A voter cannot question the validity of a primary election law because he or she is an elector where the law involves the rights of other voters in the state, but not his or her own. And registered electors have no standing to challenge the provisions of an absentee ballot statute, since their interest is not peculiar to them, not direct, and too remote and speculative. However, plaintiffs who asserted voter standing in challenging a transportation funding law had a cognizable claim under a constitutional provision prohibiting contracting state debt without a public referendum. An independent political candidate had standing to challenge a state statutory requirement that nominating petitions must contain each signer's voter registration number; and voters enrolled in the Republican Party had constitutional standing to bring an equal protection challenge to a New York statutory scheme pursuant to which national convention delegate candidates, to be eligible for the ballot, had to collect signatures from the lesser of five percent or 1,250 of enrolled Republicans in their congressional districts.

Voters who did not live in newly-created majority-minority congressional districts, and who did not allege any specific facts showing that they personally had been subjected to any racial classification, have been held to lack standing to challenge such districts as racial gerrymanders in violation of the Fourteenth Amendment; but voters who did live in such districts have been held to have standing to challenge the composition of such districts. However, the standing of voters to challenge a state constitutional provision prohibiting political parties from endorsing candidates for nonpartisan office and thereby preventing these candidates from mentioning party endorsements in voter pamphlets distributed by city and county officials was held questionable, where a separate state statute, the constitutionality of which was not litigated, provided that a candidate's statement could not include the party affiliation of the candidate.

Individual members of a state medical association and political committee formed by the association had standing to challenge the constitutionality federal election law section prohibiting individuals and unincorporated associations from contributing more than $ 5,000 per calendar year to any multi-candidate committee, since the individuals were eligible to vote in federal elections and, as members and officers of the organizations, they had a sufficiently concrete stake in the controversy; however, plaintiffs who alleged that they suffered injury as candidates, would-be candidates, and voters who were excluded from an integral part of the electoral process because they did not have the large sums of money needed to influence the congressional campaign funding process lacked standing to challenge the validity of the Federal Election Campaign Act.

160 Other miscellaneous classes

Contractors have standing to assert an equal protection challenge to an ordinance according preferential treatment to certain minority-owned businesses in the award of city contracts. And subcontractors who are not awarded portions of a federal highway contract as a result of the contract's subcontractor compensation clause, offering financial incentives to prime contractors for hiring disadvantaged subcontractors, have standing to seek forward-looking declaratory and injunctive relief against the future use of such compensation clauses on equal protection grounds.

An amicus curiae may not raise a constitutional question, nor will the court consider a constitutional point suggested or raised only by an amicus curiae, except where the question relates to the jurisdiction of the court.

Professors at state colleges were held to lack standing to challenge the constitutionality of a statute prohibiting state employees from serving in the state legislature, where the professors were not formal candidates for the legislature, although they filed declarations of precandidacy, and where the citizens' group to which they belonged did not allege any injury to itself or to any of its members, apart from the wasteful spending of taxes, because standing requires actual injuries to complainants, and allegations of general injury produced by wasteful spending of taxes are not sufficient.

A party subject to a criminal prosecution clearly has a sufficient personal stake in the penalty that the offense carries, and thus the defendants in a drug prosecution case, even though they were not yet convicted, had standing to challenge the constitutionality a state statute providing for mandatory minimum sentences for trafficking in various types of illegal drugs and providing a court with the power to reduce or suspend a sentence if a convicted defendant is willing to cooperate with law enforcement authorities in the apprehension of others involved in drug trafficking.

161 Strangers to litigation or subject matter thereof; nonparties

A person who is not a party to a certain contract cannot raise the constitutional objection that a particular statute impairs the obligation of the contract. Nor can strangers who are not parties to an action raise the question of the constitutionality of a statute as impairing the rights of a party. Furthermore, one brought before the court as a formal party only will not be heard to object that there has been a denial of due process in enlarging the liability to be borne by someone else.

162 Waiver

It is generally recognized that one may waive the right to question the constitutionality of statutes. The general rule is that a constitutional question must be raised at the earliest opportunity or it will be deemed waived. In other words, a party who claims that he or she has been deprived of a constitutional right may have waived his or her privilege of asserting its existence by his or her laches in raising the constitutional question. And it has been said that a voluntary failure to assert a right provided by statute constitutes a weak foundation for a claim that the statute denies a constitutional right. While a party may waive such constitutional rights where they are exclusively private and no consideration of public morals or policy is involved, acquiescence in the loss of fundamental rights is not presumed.

163 Estoppel, generally

It is a well-recognized rule in constitutional law that estoppel may operate to prevent a party from asserting that an act is unconstitutional, unless the proceeding under the act or what is sought to be accomplished is per se illegal. Such estoppel may arise from specific conduct, or from inaction. An estoppel results where rights are secured on conditions preventing the questioning of a law. And the failure to raise an opportune objection to an order of the court amounting to an invasion of a constitutional right may amount to a waiver of this right.

Estoppel to question the constitutionality of laws applies not only to acts of the legislature, but to ordinances and proceedings of municipal corporations, and may be extended to cases where proceedings of a municipal corporation are questioned on the ground of the unconstitutionality of the statute under which they are had, as well as to cases where they are attacked on other grounds.

164 Procuring enactment of, or accepting benefits under, legislation

A person who in any way procures, or assists in procuring, the passage of an act is generally considered as estopped and as not being entitled to question its validity. It is not necessary, in order to work an estoppel, that active efforts have been made to secure the passage of the statute in question.

One who voluntarily proceeds under a statute and claims the benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. Certainly such a person will not be allowed to retain his or her advantage or keep his or her consideration and then repudiate the act as unconstitutional. This principle applies also to questioning the rules or actions of state or federal agencies or commissions.

Despite the foregoing, the Federal Government may not interpose the doctrine of constitutional estoppel as a defense if a party wishes to challenge an unconstitutional condition which is imposed on the receipt of federal funds. And persons accepting certain benefits under a state regulatory act are entitled to challenge the validity of other, separate provisions of the act. Also, the fact that a student who brought an action challenging a statute authorizing a school district to charge for transportation to school had agreed to pay the charge and obtain transportation did not preclude her from challenging the constitutionality of the statute.

From the foregoing discussion, the rule naturally develops that one who invokes the provisions of a law, in proceedings or otherwise, may be denied the right to question its constitutionality. Thus, one who brings a suit under a statute thereby concedes its validity. It has also been held that taking part in a proceeding which fixes liability under a law without raising any question as to the constitutionality of the law is a waiver of the right to raise that question subsequently.

165 Limitations on, and exceptions to, rules of waiver and estoppel

The principles regarding estoppel on challenging the constitutionality of statutes are not applied solely on technicalities. Estoppel is established only on substantial grounds of prejudice or change of position. Thus, in order to establish a claimed estoppel to raise a constitutional question by reason of a former recognition of the validity of the statute, it should appear that some injustice or injury will result from the withdrawal of such recognition. And the doctrine is not extended beyond the reasonable limits of the law under which benefits have been taken. One claiming rights under a statute is not precluded from attacking as unconstitutional a subsequent amendment. It is also an established principle that no one may waive the public interest involved in constitutional provisions.

An important exception to the general doctrine of waiver or estoppel to assert the invalidity of a law is that where there is compliance with a statute which requires a duty which is mandatory in form, accompanied by penalties for failure to obey its provisions, or is otherwise coercive. In such cases the element of voluntary action essential to waiver or estoppel is absent.

While as a general rule one who invokes the aid of a statute may not question its constitutionality, that principle is not of invariable application. Thus, acceptance of benefits may not preclude attack on the validity of an act where it is apparent that compulsion has accompanied the benefits, which are accepted under protest.

Although there is authority to the contrary, some cases hold that the general rules of waiver and estoppel are subject to the important limitation that an estoppel or waiver does not necessarily extend to all parts of the statute in question. Thus, it is said that an estoppel by acceptance of benefits does not preclude an attack upon an independent and separable portion of the statute, although conditions or limitations attached to the benefits are thereby avoided.

In the absence of an imperative necessity to protect the public from irresponsible activity of so serious a nature that it would disrupt the public welfare, constitutional protections are not subject to destruction by a public employer's insistence that they be waived by contract.

166 Generally

While it is absolutely clear that no act of Congress or a state legislature can authorize a violation of the federal or state constitutions, and that no statute can either enlarge or contract a constitution, it is nonetheless accepted that there is a strong presumption that all regularly enacted statutes are constitutional. In other words, statutes are not presumed to be irrational. Thus, where possible, congressional enactments are to be interpreted so as to avoid raising serious doubts or constitutional questions.

Observation: Statutes enacted as initiative measures enjoy the same presumption of validity as do statutes enacted in the usual way.

The general principle that there is a strong presumption that all regularly enacted statutes are constitutional has been expressed in a variety of ways. Thus, it has been said that all statutes are of constitutional validity unless they are shown to be invalid; that legislatures are presumed to have acted constitutionally in passing a statute; that the courts must start out with the presumption that a statute is constitutional and valid; that every intendment is in favor of the validity of a statute; that every act of the legislature is presumed to be in harmony with the constitution unless the contrary clearly appears; that every act of the legislature and every law found on the statute books is presumptively valid, at least if the statute is not patently unconstitutional on its face; that the courts will indulge in every presumption of constitutionality of which the statute is susceptible; that every rational and reasonable presumption must be indulged in favor of the validity of an act; and that the presumption of constitutionality is the postulate of constitutional adjudication. The presumption should be the foremost thought in the court's mind as it proceeds to determine the constitutionality of a statute. [n18]

Classifications that neither involve fundamental rights nor proceed along suspect lines are accorded a strong presumption of validity if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. The presumption of constitutionality which attaches to every act of Congress is not merely a factor to be considered in evaluating success on the merits, but is an equity to be considered in favor of the government in balancing hardships; and that the Supreme Court will not impute to Congress the intent to pass legislation that is inconsistent with the Constitution as construed by the Supreme Court. State courts generally also presume that state legislatures have enacted statutes that are consistent with state constitutions. Thus, for example, if a legislative classification or distinction neither burdens fundamental rights nor targets suspect classes, it will be upheld it against equal protection challenges so long as it bears rational relation to some legitimate end.

167 Basis or rationale for general principle

Various bases for the fundamental principle as to the existence of a presumption in favor of the legality of legislation have been stated. The most important is the doctrine which forbids one branch of the state government to encroach on the duties and powers of another. Thus, the presumption is said to be based on the high respect which the judicial branch of the government holds for its coordinate branch, the legislature, the Supreme Court of the United States having recognized that when it is required to pass on the constitutionality of an act of Congress, it assumes the gravest and most delicate duty that it is called upon to perform.

168 Force and conclusiveness of general principle

Although the presumption of constitutionality afforded to legislation is a strong and heavy one, it is not absolutely conclusive, and may be rebutted.

The ultimate determination of the constitutionality of any act of the legislature rests with the courts, notwithstanding the presumption in favor of the constitutionality of such acts. However, when a state law has been authoritatively construed

so as to render it constitutional, or a well understood and uniformly applied practice has developed that has virtually the force of judicial construction, the state law must be read in light of those limits when challenged on First Amendment grounds.

The presumption of constitutionality is especially strong with regard to laws involving taxation, and laws attacked as violating the equal protection requirements of the federal and state constitutions. As to the latter the presumption is in favor of the legislative classification, of the reasonableness and fairness of the legislative action, and of the legitimate grounds of distinction, if any such grounds exist, on which the legislature acted.

169 Limitations on general principle

Not all legislation is entitled to a presumption of validity. It has been held in some jurisdictions, for instance, that when a statute proposes to deny, modify, or diminish a right or immunity secured to the people by a clear and explicit constitutional provision, the presumption in favor of the constitutionality of statutes no longer applies; instead, a contrary presumption arises against the validity of such statute. Similarly, it has been said that the presumption of constitutionality is inapplicable in civil rights cases or in other cases involving fundamental constitutional rights, especially those rights guaranteed by the First Amendment. And the Supreme Court has pointed out that the United States Constitution nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections. Thus, it has said that any system of prior restraints of expression comes before the Court bearing a heavy presumption against its constitutional validity. The presumption of constitutionality has been held inapplicable to a state statute abridging freedom of the press assured by the state and federal constitutions; and the United States Supreme Court has consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appears on its face to violate a specific prohibition of the Constitution.

170 Law-making bodies to which presumption applies

The principles regarding the presumption that all legislation is constitutional apply to the action of all lawmaking bodies which are legally constituted. They have been applied to acts and joint resolutions of Congress. In fact, the United States Supreme Court has said that a stronger presumption of validity is normally accorded to a congressional judgment than to an individual executive's disciplinary action or to the presumption of regularity afforded an agency in fulfilling its statutory mandate.

The presumption of validity also applies to administrative rules and regulations, such as military regulations, to citizen initiatives, and to statutes adopted by state legislatures, and to local laws, ordinances, or regulations adopted by counties, municipalities, and administrative bodies such as zoning commissions.

171 Presumption as to facts relied on by legislature

If an act of the legislature would be valid only in the event certain facts and circumstances exist, it will be presumed that all such facts and circumstances do exist. There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. Thus, where the classification embodied in legislation is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of the state of facts at the time the law was enacted must be assumed. This rule regarding presumed factual support for legislation is generally held to be fully applicable to exercises of the police power.

If it is essential that the legislature have evidence of particular facts in order properly to pass a statute, it is presumed that such evidence was actually and properly before the legislative body; and that it acted on a full knowledge of the facts, based on adequate inquiry and information.

All facts necessary to sustain a statute must be taken as conclusively found by the legislature, if any such facts may reasonably be conceived in the mind of the court. This is true even in the absence of an express finding by the legislature of the existence of the fact in the act itself, and the presumption that the determination of the legislature is supported by facts known to it obtains unless facts judicially known or proved preclude that possibility.

Despite the foregoing, it is not necessary for the legislature to have relied on any particular set of facts in passing a statute, because legislation may be sustained against a constitutional challenge even if the legislative body fails to specify any reasons at all for its action.

172 General rule

In construing statutes in relation to constitutional provisions, courts take into consideration the principle that every statute is to be read in the light of the Constitution, and that the Constitution and a statute involving constitutional rights will be construed together as one law.

The courts, in applying rules of statutory construction to legislation which is under constitutional attack, must apply them with a view to bringing the legislation into line with constitutional requirements, that is, courts should favor validating the legislation rather than invalidating it; and courts favor that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. In other words, in the absence of a clear legislative intent, a court will not adopt an interpretation of a statute that would render it constitutionally suspect. Therefore, when a federal court is dealing with a federal statute challenged as overbroad, it should construe the statute to avoid constitutional problems if the statute is subject to such a limiting construction; and when a state court is dealing with a state statute challenged as overbroad, it should construe the statute to avoid constitutional problems if the statute is subject to such a limiting construction. Such a construction will be binding on the federal courts.

Although a court may construe a statute to avoid constitutional infirmity, a statute coming uncomfortably close to a constitutional violation does not trigger the application of that canon of construction. It is a wise and settled policy to hold a statute unconstitutional only as a last resort, and only when the unconstitutionality of the statute is shown clearly or beyond a reasonable doubt. Moreover, the duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts. The general principle relating to the duty of the courts to uphold legislation if possible applies with particular emphasis to exercises of the police power.

In ascertaining whether a statute is constitutional, its various applicable provisions must be considered as a whole. Courts will, in order to avoid declaring any part of an act unconstitutional, give it such a construction as will enable it to take effect in all its parts, since it is their duty, if possible, not only to construe as a whole and harmonize all valid legislation on the same subject, but also to adopt a construction making all of the legislation's provisions valid. If a construction which appears reasonable, which is in accord with common sense, and which is fairly within the contemplation of the legislature, constitutionality can be sustained, the statute will not be struck down. And if, by a particular mode of reasoning, the constitutionality of legislation may be sustained, it is irrelevant whether such reasoning in fact underlay the legislative decision, as it is also irrelevant that the statute did not extend to all to whom the postulated rationale might in logic apply.

173 Corollary rules of construction; court's rewriting the law

Statutes should be construed liberally in order to save them from constitutional infirmity. Nonetheless, while a court will liberally construe a legislative enactment with a strong predilection for its constitutionality, and will seek by every legitimate means to put an interpretation on the law that will confirm its constitutionality, there are well-defined limits to the court's power in that regard. No court in its effort to save a law can properly pervert or destroy a statute's plain meaning, and so make it express that which the legislature itself did not declare. Thus, a court may not, in order to bring a statute within the fundamental law, amend it by construction.

The canon of construction that a court should strive to interpret a statute liberally in a way that will avoid an unconstitutional construction is useful in close cases, but it is not a license for the judiciary to rewrite the language enacted by the legislature.

174 Court's engaging in forced, disingenuous, or futile constructions

A court cannot make unconstitutional provisions constitutional by forced constructions, or by regarding form rather than substance; a statute is constitutional or unconstitutional by reason of its scope and purpose and effect, and it is tested by a realistic consideration of the subject which it encompasses, the purpose which it seeks to serve, and the effect it will have when put in operation. If there is no way of harmonizing a statute with the constitution, the statute must fall.

Where the language used in a statute is plain, the court cannot read words into it that are not found therein either expressly or by fair implication, even to save its constitutionality, because this would be legislation, and not construction; and the court cannot arbitrarily disregard language used by the legislature.

The principle that a statute must be construed, if fairly possible, so as to avoid doubts as to its constitutionality, will not be pressed to the point of disingenuous evasion where the legislative intention is distinctly revealed. The canon of avoidance of constitutional doubts must give way where its application would produce a futile result or an unreasonable result plainly at variance with the policy of the legislation as a whole.

175 Adoption of constitutional alternative where statute is susceptible of two interpretations
Where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other of which it would be valid, a court should adopt the construction which will uphold it, even though the construction which is adopted does not appear to be as natural as the other. Thus, a reviewing court is barred from lightly choosing that reading of a statute's setting which will render it unconstitutional over that which will save it.

Stated differently, the courts must give the force of law to an act of the legislature whenever it can be fairly so construed and applied as to avoid conflict with the constitution. However, the construction that is given must be a plausible one, and it must be consistent with sound sense and wise policy, and with the legislative intent. Thus, a court's duty to construe statutes so as to avoid constitutional problems does not require the court to adopt a construction that renders a statute meaningless or nonsensical, nor does it require the court to interpret the statute in a manner clearly contrary to congressional intent.

The rule that a statute will be given that construction which will render it valid if it is susceptible of different constructions is, of course, also applicable to ordinances.
176 Avoiding doubts or resolving them in favor of legislation
The duty of the courts to construe a statute so as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave or serious doubt upon that score. And if the proper construction of a statute is doubtful, the doubt -- that is, every reasonable doubt -- must be resolved in favor of the law. Indeed, even if a serious doubt of the constitutionality of a statute is raised, a court will first ascertain whether construction of the statute is fairly possible by which the question may be avoided.
177 Reconciliation of conflicts and inconsistencies
If an asserted conflict or repugnancy between a statute and the federal or state constitutions can be reconciled, the court must do so. Courts are bound to construe statutes so as to give them validity and a reasonable construction; seeming inconsistencies in various provisions of the statutes should be reconciled, if possible, so as to arrive at the meaning that gives effect to all parts of the statutes. It follows that where the language of a statute is consistent with the language and purposes of the constitution and can readily be reconciled therewith, the statute will be held constitutional.

This rule applies to appellate courts as well as trial courts. Both have an obligation to pursue every reasonable path of reconciliation of a challenged statute consonant with the Constitution; every presumption in favor of the statute will be indulged, and every effort will be made to construe ambiguous language so as not to conflict with the fundamental law.
178 Giving legislation a narrow or restricted scope
Within certain limits the courts, in order to uphold legislation, may restrict its application to a legitimate field of legislation unless the act clearly indicates a different intention on the part of its framers. If an ambiguous or very general statute may, by a fair and reasonable interpretation of its language, be so narrowed, limited, or restricted as to bring it within the scope of the constitutional power of the legislature, it is the duty of the courts to adopt the construction that will bring it into harmony with the constitution. A statute should not be given a broad construction if its validity can be saved by a narrower one, and acts of the legislature which are directed against known and stated evils are not to be stretched to cover situations having no real or reasonable relation to those evils when to do so would render the statute unconstitutional. Hence, constitutional objections to a statute which may exist if it is given a wider application than it is necessary to give in deciding a case are not open to consideration therein.

The doctrine of restrictive interpretation to preserve validity is subject to necessary limitations. The courts may not, unless a statute is so ambiguous as to call for construction, so limit an act by judicial construction as to confine its operation within the constitutional limits of the legislative power.
179 Interpreting legislation as prospective or retroactive in operation
Courts normally should give retroactively applied legislation the same deference as legislation applied prospectively. However, a retroactive operation need not be given to a statute which by its terms may be made to apply to past as well as to future matters, where such retroactive effect would make the statute unconstitutional. Although the Due Process Clause places more stringent constraints upon the retroactive reach of Congress than upon its prospective authority, courts nonetheless favor retroactive economic legislation with a presumption of constitutionality and uphold such legislation unless the challenging party proves it to be arbitrary or irrational.

180 Generally

It is obvious that a statute is constitutional or unconstitutional in accordance with the way in which it operates and the effect that it has. It follows that, in passing on the constitutionality of a statute, it is frequently important to examine its effect and the results it is intended to accomplish. The general rule is that in whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect. The constitutionality of an act depends on its real character and on the end designed to be accomplished rather than on its title or the professions as to its purpose which may be contained in it, and therefore such declarations do not end the court's inquiry, no matter how praiseworthy the declared purpose may be. [n28] Thus, the question whether a state law deprives a party of rights secured by the Federal Constitution depends upon its practical operation and effect, not upon how it is characterized, and the constitutionality of federal legislation is to be determined by the manner in which the enactment works in its practical application. A statute fair upon its face may be shown to be void and unenforceable on account of its actual operation.

Since an act depends primarily on its objective result and effect for its validity, the fact that the legislature has mistaken ideas concerning it or that the makers of the constitution might not have considered it has little bearing upon its constitutionality. Thus, a mistake of the legislature as to the constitutional basis for an act does not prevent the act from being a valid one if it is constitutional for other reasons.

181 Determination; judicial technique

The eyes of the courts are never limited to the mere letter of a law, since they may look behind the letter to determine the law's true purpose and effect. Accordingly, the principle has been laid down that the courts are not bound by mere forms, nor are they to be misled by mere pretenses; they may look at the substance of things whenever they enter on the inquiry whether the legislature has transcended the limits of its authority.

The validity of a statute or ordinance is to be determined from its general purpose and its efficiency to accomplish the end desired, not from its effect in a particular case. Hence, the question is to be determined by what may be done under and by virtue of its authority, not by what has been done under an act in any particular instance. Mere proof of the use of a statute for purposes not intended does not justify a court in annulling it.

This principle is applicable to permit judicial consideration of an assumed state of facts to which a statute, on its face, is applicable. Judicial consideration of various states of facts to which the statute might be assumed to apply would appear inconsistent with the well-established rule that abstract and hypothetical constitutional questions will not be decided, and also inconsistent with cases holding that it is not to be assumed in advance, in any type of action, that a law will be so construed so as to bring it into conflict with the Constitution or an act of Congress.

Although it is conceivable that a statute may be fraudulently and patently violative of express constitutional prohibitions in every sentence, clause, and paragraph, and in whatever manner and against whomever an effort might be made to apply it, the question more commonly raised is whether a statute valid as to one set of facts may be invalid as to another. A statute valid at one time may become void at another because of altered circumstances. Thus, if a statute in its practical operation becomes arbitrary or confiscatory, its validity, even though affirmed by a former adjudication, is open to inquiry and investigation in the light of changed conditions. But while it is perhaps not impossible that a change of conditions since the enactment of a statute may render it invalid notwithstanding its earlier validity, mere obsolescence is not a generally recognized ground for a determination of invalidity.

182 Consideration of manner of administration of statute

Another well-established principle is that the effect of the statute may be found in the manner in which it is administered: not only the final purpose of a law must be considered in determining its justice, but the means of its administration, and the ways it may be defeated, for legislation to be practical and efficient must regard this special purpose as well as the ultimate one. In testing the effect of a statute by the manner of its administration, the test is exactly opposite to that ordinarily employed -- the court looks to what was actually done in the particular instance, and not what might have been done. Thus, where the validity of a tax assessment by state officers is properly challenged, and the matter comes before the United States Supreme Court, that court must determine the effect of the thing actually done, and what might have been done under the local statute is not controlling. In such situations the possibility of abuse is not an objection to constitutionality, and a law cannot be held unconstitutional merely because it may be unfaithfully or improvidently administered. Moreover, to invoke the principle dealing with the unconstitutional administration of a statute which is constitutional on its face, it must appear that there is an element of intentional or purposeful discrimination by the enforcement authorities.

183 Generally
The length of time a statute has stood without any attacks on constitutional grounds is a factor which sometimes influences a court in upholding its constitutionality. And long acquiescence in repeated acts of legislation on particular matters is evidence that those matters have been generally considered as matters within legislative control. A like rule has been held applicable to long acquiescence in the constitutionality of statutes similar to the one under consideration.

Similarly, where a law has been held constitutional by courts of other states before the enactment of a similar law in this state, that fact should be considered in determining whether the statute is so clear a violation of the provisions of the constitution as to require the courts to hold it unconstitutional. The courts may properly recognize the serious results which would follow from a decision that a law is unconstitutional, where during a long period of acquiescence in its validity rights have become vested in reliance upon it. There is even some authority to the effect that under the doctrine of stare decisis, when a decision of a court of last resort determining the constitutionality of a statutory provision has been acquiesced in by the legislature and the people for a considerable period of time, and rights and interests have become settled thereunder, and no apparent beneficial result will be obtained by overruling such decision, the court will steadfastly decline to reopen the question of constitutionality.

Observation: This is, of course, a relatively extreme position, and there are numerous holdings which are expressly or impliedly to the contrary. Thus, the willingness of the United States Supreme Court to overrule earlier decisions (including decisions on questions of more or less basic constitutional importance) when error therein becomes manifest is familiar to all lawyers. Moreover, the fact that a statute has been construed and applied for a considerable period of time does not necessarily render it free from constitutional attack, and acquiescence over a period of many years will not render an unconstitutional statute valid.
184 For particular periods of time
The presumption of validity which applies to legislation generally is fortified by acquiescence through a number of years. A long and consistent history of state practice is significant in the determination of the validity of such practice under the Federal Constitution; if a thing has been practiced for 200 years by common consent it will need a strong case for the Fourteenth Amendment to affect it. But such usage and interpretation are entitled to no weight if the statutes are in conflict with the plain meaning of the Constitution.
185 Conformity with spirit of constitution and natural rights; preamble
It is a familiar rule of constitutional law that courts are not at liberty to declare an act void because it is opposed to the spirit supposed to pervade the constitution, is against the nature and spirit of the government, or is contrary to the general principles of liberty or genius of a free people. The courts are not guardians of the rights of the people except as those rights are secured by some constitutional provision which comes within the judicial cognizance. Therefore, the spirit of the Federal Constitution, or the preamble to the federal or a state constitution, cannot be invoked, apart from the words of the constitution, to invalidate a state statute or a state constitutional amendment.

Although at one time it was held that courts could pronounce legislation void on the grounds of its conflict with supposed principles of natural justice or common right, this view has been abandoned. The only test of the validity of an act regularly passed by a state legislature is whether it directly violates any of the express or implied restrictions of the state or federal constitutions, and all acts of the legislature are valid unless they so conflict. Hence, if a given statute is not clearly repugnant to some constitutional guarantee, the courts are without power to interfere, for they do not sit to review or revise legislative action within its constitutional limits.
186 Fairness, harshness, and hardship
Courts are not at liberty to declare statutes invalid although they may be harsh, unfair, inequitable, or abused and misused, or because they may afford an opportunity for abuse in the manner of their application, create hardships or inconvenience, or may be oppressive, severe or drastic, mischievous in their effects, burdensome on the people, and of doubtful propriety. Conversely, the duty of the courts to give effect to the federal and state constitutions by invalidating acts in conflict with the organic law is not affected by the fact that the invalid legislation may seem highly beneficial or by the fact that great harm or unrest may result from declaring it void. The fact that a given law or procedure is efficient, convenient, and useful in facilitating the functions of government, standing alone, will not save it if it is contrary to the Constitution. The protection against such burdensome laws is by an appeal to the justice and patriotism of the people themselves or of their legislative representatives.
187 Reasonableness
The question of the reasonableness of an act that is otherwise within constitutional bounds is for the legislature exclusively, and in ordinary cases the courts have no revisory power concerning it or any power to substitute their opinion for the judgment of the legislature. Mere unreasonableness does not necessarily render a statute unconstitutional. A

longstanding, widespread practice is not immune from constitutional scrutiny, but neither is it to be lightly brushed aside, particularly when the constitutional standard pertinent to the practice is as amorphous as the word "reasonable," and when custom and contemporary norms play a large role in the constitutional analysis. But this rule does not mean that constitutional guaranties may be violated by unreasonableness. Thus, the courts may inquire whether an act of Congress is arbitrary or capricious, that is, whether it has a reasonable relation to a legitimate end.

188 Justice or injustice

Because the validity of statutes is determined solely by ascertaining whether or not they are within the purview of legislative powers as limited by the federal and state constitutions, and by those limitations alone, the rule is established beyond controversy that the justice or injustice of statutory provisions is for the legislature to decide, and is not for the courts, and statutes cannot be declared invalid on the ground that they are unjust. In fact, for purposes of statutory interpretation, legislatures are presumed to have intended a reasonable, just, and constitutional result; and courts will not infer a legislative intent that is capricious or unconstitutional if the statutory language admits of an alternative interpretation which would serve the statutory policy and render the application of the law reasonable and just.

Legislative acts within the power of the legislative body are not subject to revision or control by the courts on the ground of absurdity, injustice, or like impropriety, or because they are contrary to the principles of natural justice, or based on conceptions of morality with which the courts may disagree.

189 Wisdom, expediency, and related qualities

One of the most firmly established principles in the field of constitutional law is that the wisdom, necessity, utility, and expediency of legislation are exclusively matters for legislative determination. The courts will not invalidate laws otherwise constitutional for any reasons such as these or declare statutes invalid because they may seem to the court to be detrimental to the best interests of the state. The remedy for the correction of unwise legislation remains solely in the people who, by making the necessary changes in the legislative body, may have the improvident or pernicious legislation of one legislature corrected by its successors. The constitutionality of legislative acts is to be determined solely by reference to the limits imposed by the constitution. The only question for the courts to decide is one of the legislature's power, not one of a statute's expediency or wisdom. Thus, the fact that the purpose of the statute is laudable will not validate it if it is unconstitutional, and the fact that an alternative method exists does not matter so long as the method chosen by Congress or a state legislature is a constitutional one.

Whether an enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired results, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance. Unless a legislative act contravenes the Constitution, the courts are simply without power to grant relief from the operation of a bad law.

190 Propriety, necessity, or desirability

The propriety or impropriety of legislation is not a factor relevant to its constitutional validity. And a statute or ordinance which is unnecessary is not for that reason unconstitutional; indeed, in determining the constitutional validity of legislation, the courts are unconcerned with issues as to the necessity for the enactment of the legislation in question. Thus, it has been said that it is not for the court to decide whether a law is needed and advisable in the general government of the people. It is similarly true that a court will not strike down legislation as unconstitutional merely because, in its view, the legislation is undesirable.

191 Uniqueness, novelty, or redundancy of legislation

The courts are not concerned with the uniqueness of a statute whose constitutionality is questioned, but the fact that legislation is novel is no evidence of its unconstitutionality. By the same token, the mere fact that a statute is redundant, standing alone, is not a ground for a constitutional attack upon the statute.

192 Conformity with public policy

It is generally recognized that the public policy of a state is to be found in its constitution and statutes. Only in the absence of any declaration in these instruments may it be determined from judicial decisions. That is because a legislative act, if constitutional, declares in its terms the policy of the state and is final so far as the courts are concerned.

With the foregoing considerations as its basis, the rule has become securely settled that all questions of policy, including changes therein, are for the determination of the legislature, and not for the courts. Where courts include in their decrees their opinions on questions of public policy, they in effect make the judicial tribunals lawmaking bodies in usurpation of the powers of the legislature, in violation of the principle that the province of the courts is not to regulate, but to effectuate, the policy of the law as expressed in valid statutes. In this connection, it has been said that nothing in the structure

of the government of the United States or the text of the Constitution warrants judicial review of legislation by standards which require the courts to equate their political judgment with that of Congress. Furthermore, a statute is conclusive as to the public policy of the state unless it contravenes constitutional provisions. Hence, the courts are not at liberty to declare a law void as in violation of public policy. So long as state policy can be applied constitutionally under some set of circumstances, a facial challenge to that policy must ordinarily fail; and the fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. In other words, as a general matter, a court will not invalidate a statute on its face simply because it may be applied unconstitutionally, but only if it cannot be applied consistently with the Constitution, and that same principle applies when part of a statute is challenged on "facial" grounds; nor shall a court strike down a law as unconstitutional on the basis of a "worst case" analysis that may never occur.

193 Legislative motivation; presumption of good faith

There is a general presumption of good faith that attaches to all lawmaking bodies -- that is, primarily the courts will assume that the lawmaking body considers the effect of legislation on the constitutional rights of citizens, that it acts from patriotic and just motives with a desire to promote the public good, in pursuit of a legitimate object, and that a legislature has acted within its constitutional powers.

Courts cannot impute to the legislative department a disregard of any fundamental principle of civil liberty; nor will they impute to it an improper motive. Additionally, in judging the constitutionality of a statute, a court cannot assume that the statements of a very few members of the legislature constitute the motivation of the entire legislature, and, in fact, a statute's legislative history does not render it unconstitutional if the statute otherwise meets constitutional standards on its face.

194 Inquiry into and proof of actual motives

Given the presumption in favor of legislative good faith in passing constitutional statutes, judicial inquiries into legislative motives are considered to be hazardous, especially when such inquiries seek to go behind objective manifestations. Thus, if a statute appears on its face to be constitutional and valid, courts will not inquire into the motives of the legislature, or influence brought to bear to secure enactment of a statute. For example, courts cannot declare a statute void because of alleged improper motives which influenced certain members of the legislature that passed the law, because legislation has been sponsored and promoted by "those who advantage from it," or because of the political considerations which may have motivated the adoption of a statute. It is simply not a judicial task to search for sinister ulterior motives underlying the legislature's acts in order to find statutes unconstitutional, as questions of legislative motivations are for the electorate to consider, not the courts.

Just as bad motives of the legislators do not nullify laws passed within the bounds of the Constitution, it is well established that good motives or good faith on the part of the legislators in passing a law will be ineffective in sustaining it if it clearly violates the provisions of the Constitution.

The rule as to the inapplicability of legislative motive or interest to invalidate enactments is subject to the established exception that such matters may be gone into by the courts to the extent that they may be disclosed on the face of acts or may be inferable from their operation. Thus, the principle that a court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive is inapplicable, and the purpose of the legislation is irrelevant, where its inevitable effect -- its necessary scope and operation -- abridges constitutional rights.

Observation: Where the courts do consider the question of motivation, it has been said that selected statements, even when made by the sponsor of the legislation, reflecting a particular motivation for the statute that would render it unconstitutional are generally not sufficient to overcome the presumption of constitutionality which attends the statute. Also, if proof of a racially discriminatory purpose in a local rezoning decision is shown, the burden shifts to the decisionmaking authority to establish that the same decision would have resulted even had the impermissible purpose not be considered.

195 Correctness of legislative determination of factual issues

On frequent occasions the constitutionality of a statute depends on the existence or nonexistence of certain facts. In view of the presumption in favor of the validity of statutes, it must be supposed that the legislature had before it when the statute was passed any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as the equivalent of such finding. To the extent to which Congress' findings of legislative facts are relevant to a judicial determination, such findings are entitled to due respect by the courts.

The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the lawmaking body may rationally believe such facts to be established. This principle would seem to be reflected in the proposition that the constitutionality of a statute cannot be tested by its preamble.

As a general rule it may be stated that the determination of facts required for the proper enactment of statutes is for the legislature alone, that the presumption as to the correctness of its findings is usually regarded as conclusive unless an abuse of discretion can be shown, and that the courts do not generally have jurisdiction or power to reopen the question or make new findings of fact.

196 Extent to which judicial review is permissible

Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislature, the general rule is that the courts will acquiesce in the legislative decision unless it is clearly erroneous, arbitrary, or wholly unwarranted. In other words, the burden is on the complainant to establish that the legislature acted in an arbitrary and irrational way. Thus, a court must make every feasible attempt to discern the reasons for a legislative distinction before it declares that distinction irrational and unconstitutional.

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing the court that those facts have ceased to exist. In addition, when examining constitutionally challenged legislation, the courts are required to review subsequent developments which may have changed the validity of information before the Legislature at the time of the statutory enactment.

Whenever the determination by the legislature is in reference to open or debatable questions concerning which there is a reasonable ground for a difference of opinion, and there is probably some basis for sustaining the conclusion reached, the legislature's findings are not subject to judicial review. And in cases involving the validity of legislation the courts have no power to determine the merits of conflicting theories, to conduct an investigation of facts which may enter into questions of public policy or expediency, or to sustain or frustrate the legislation according to whether the courts happen to approve or disapprove of the determination of such questions of fact by the legislature. It is not the function of the courts to reweigh the diverse factors which the legislature has considered or to question the conclusion which the legislature has reached, and if any state of facts, known or to be assumed, justifies the law, the court's power of inquiry ends.

The Supreme Court has held that a reviewing court may not easily set aside a considered congressional judgment as unconstitutional, but that deference to a legislative finding nonetheless cannot limit judicial inquiry when First Amendment rights are at stake. And a finding by the legislature of the existence of a moral obligation of the state, relating to a matter primarily juristic in nature and not merely factual, is subject to judicial investigation and consideration, and the determination of the existence of such obligation is a judicial, not a legislative, function.

197 Determination and declaration of emergency

Emergency situations do not obliterate constitutional guarantees, but they are relevant to their application; the absence of any emergency eliminates any claim that necessity justifies otherwise dubious measures. With reference to a determination and declaration of an emergency by a legislative body, the generally prevailing view is that such a question is primarily for that body to determine, but that its determination is not conclusive and is subject to review by the courts. This view has been followed with respect to state legislatures and statutes and local legislative bodies and ordinances. The view is not, however, universal, and there are some cases holding that a state or local legislative determination of an emergency is conclusive on the courts, even though they may feel that the reasons for the declaration of an emergency stated by the legislative body are not satisfactory, except, perhaps, where the declaration of a statute or ordinance as an emergency measure is for reasons which are obviously illusory or tautological.

198 Burden of proof

A party who alleges the unconstitutionality of a statute normally has the burden of substantiating his or her claim. The burden is a heavy and difficult one, and it is well settled that to sustain it, the assailant must negate every reasonable, conceivable basis which might support the statute attacked; must be able to point out the particular provision that has been violated and the ground on which it has been infringed; with regard to facial attacks alleging invalidity, must establish that no set of circumstances exists under which the act may be held valid; and must overcome the strong presumption in favor of its validity, which continues until the contrary is proved. He or she must show how, as to him or

her, the legislation in question is unconstitutional. The above principles are applicable not only to state statutes, but also to municipal ordinances.

Observation: The principle that one challenging the constitutionality of legislation bears the burden of proving its unconstitutionality does not apply to statutes or ordinances restricting speech and other fundamental rights, inasmuch as the burden of proof in such cases rests with those who have imposed the restrictions.

199 Sufficiency of proof, generally; underlying judicial duty to uphold legislation

Generally speaking, it is the duty of the courts to uphold any statute enacted in the ordinary exercise of the legislative power if it is possible to do so without disregarding the plain command or necessary implication of the fundamental law.

Observation: A court's duty to construe statutes so as to avoid constitutional problems does not require the court to adopt a construction that renders a statute meaningless or nonsensical, nor does it require the court to interpret the statute in a manner clearly contrary to congressional intent.

In accordance with the principle of liberal construction, courts are not justified in declaring an act of the legislature invalid, if by any legitimate rules of construction its meaning can be ascertained and its provisions carried into effect. It has been said that the courts should not conjure up theories to overturn and overthrow the solemn declarations of the legislative body. Statutes are struck down on constitutional grounds only as a last resort. Thus, a legislative classification must be sustained if any reasonable distinction in support thereof can be found.

200 Quantum of proof; proof showing "clear," "palpable," or "manifest" violation of constitution

The presumption of constitutionality of a statute will prevail unless its repugnancy to the constitution clearly appears. Its invalidity must be made to appear clearly or plainly, fully, unequivocally, undoubtedly, palpably, convincingly, unmistakably, inescapably, and by highly persuasive, clear and convincing, irrefragable evidence. The statute in question must be manifestly in contravention of the constitution to be held invalid; and there must be a clear usurpation by the legislature of a prohibited power before a statute can be pronounced unconstitutional and void. Therefore, it is not on mere slight implication or vague conjecture that the legislature is to be said to have transcended its powers and passed legislation that must be considered as void.

201 Proof showing unconstitutionality beyond a reasonable doubt

In order to show a decent respect for the wisdom, integrity, and patriotism of the legislative branch by which all laws are passed, courts will presume that legislation is valid until the contrary is shown beyond a reasonable doubt. Thus, courts should not pronounce legislation to be contrary to the constitution in doubtful cases.

202 Proof showing irreconcilable conflict with constitution

If a law adopted by Congress conflicts with the Federal Constitution, then the Constitution must govern, and where there is a conflict between a statute and a state constitution, the state constitution overrides the statute. In instances where such conflicts are found, however, courts will exercise their power to invalidate legislation on constitutional grounds only where the conflict between the statute and the constitution is clear and irreconcilable. in other words, the court is without authority to declare a statute unconstitutional unless it is in positive or direct conflict with the constitution.

In construing statutes, court must interpret the laws to avoid constitutional conflicts if the language of the laws will reasonably permit such an avoidance. Thus, a clear incompatibility between a law and the constitution must exist before the judiciary is justified in holding the law unconstitutional. This principle is, of course, in line with the rule that doubts as to constitutionality should be resolved in favor of constitutionality.

203 Generally

The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed, that is, it is void ab initio. Such a statute leaves the question that it purports to settle just as it would be had the statute not been enacted.

Since an unconstitutional law is void, the general principles follow that it imposes no duties, confers no rights, creates no office or liabilities, bestows no power or authority on anyone, affords no protection, is incapable of creating any rights or obligations, does not allow for the granting of any relief, and justifies no acts performed under it. Once a statute is determined to be unconstitutional, no private citizen or division of the state may take any further action pursuant

to its provisions. A contract which rests on an unconstitutional statute creates no obligation to be impaired by subsequent legislation.

No one is bound to obey an unconstitutional law and no courts are bound to enforce it. Once a statute has been declared unconstitutional, courts thereafter have no jurisdiction over alleged violations. Persons convicted and fined under a statute subsequently held unconstitutional may recover the fines paid.

A void act cannot be legally inconsistent with a valid one. And an unconstitutional law cannot operate to supersede any existing valid law. Indeed, insofar as a statute runs counter to the fundamental law of the land, it is superseded thereby. Since an unconstitutional statute cannot repeal or in any way affect an existing one, if a repealing statute is unconstitutional, the statute which it attempts to repeal remains in full force and effect. And where a clause repealing a prior law is inserted in an act, which act is unconstitutional and void, the provision for the repeal of the prior law will usually fall with it and will not be permitted to operate as repealing such prior law.

204 Protection of rights

The actual existence of a statute prior to a determination that it is unconstitutional is an operative fact and may have consequences which cannot justly be ignored. When a statute which has been in effect for some time is declared unconstitutional, questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, and of public policy in the light of the nature both of the statute and of its previous application, demand examination. Thus, an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

Although some courts have stated that an unconstitutional statute is a nullity, void from the date of its enactment, and incapable of creating any rights or obligations, other courts, including the United States Supreme Court, have held that an unconstitutional statute is not necessarily a nullity, since it may have intermediate consequences binding upon many people. And while it is a rule of statutory construction that a statute declared unconstitutional is void ab initio and has no effect, courts, depending on the circumstances, have employed other rules which avoid the hard and fast consequences of such a rule.

Rights acquired under a statute while it is duly adjudged to be constitutional are valid legal rights that are protected by the constitution, not by judicial decision. But rights acquired under a statute that has not been adjudged valid are subject to be lost if the statute is adjudged invalid, even though the statute was considered valid by eminent attorneys, public officers, and others. And where the invalidity of an act or a portion thereof goes to the power of the legislature to enact the law, and not merely to the form of the enactment, no rights or correlative obligations may arise under such invalid statute. For example, when an invalid statute involves the compulsion of statutory duties by public officials and such officials rely on the well-known presumptive validity of statutes, a court may make a ruling on the statute prospective in effect only.

These general principles as to rights have varied practical applications. In some jurisdictions it is held that reliance on a statute which is subsequently declared unconstitutional does not protect one from civil responsibility for an act in reliance thereon which would otherwise subject him or her to liability in the absence of such a statute. On the other hand, occasionally the position has been taken, as far as omissions to perform some duty are concerned, that reliance on a statute which is subsequently held to be unconstitutional protects from civil or criminal liability one who omits an act which, but for the statute, would be required by law.

An unconstitutional law should not be applied to work an injustice or a hardship or impose a liability on one who has acted in good faith and relied on the validity of a statute before the courts have declared it invalid. And reliance on a statute subsequently declared unconstitutional may properly be considered by the jury on the issue of damages in a civil action against the one who relied upon the statute.

205 generally; by amendment of legislation

While it has been broadly stated that an unconstitutional act cannot be validated by the legislature, and that a statute declared unconstitutional is deemed void from its inception and is not revived merely because the constitutional infirmity is subsequently eliminated, such a statute may be amended so as to make it a constitutional one, at least insofar as its future operation is concerned, by removing its objectionable provisions, or by supplying others, to conform it to the requirements of the constitution.

A statute once declared unconstitutional, and later held to be constitutional, does not require re-enactment by the legislature to restore its operative force. Rights acquired under the particular adjudications holding the statute invalid are not affected by the subsequent decision that the statute is constitutional. Although a legislative enactment may be invalid merely because certain limiting language therein makes it repugnant to constitutional limitations, a court cannot cure such invalidity merely by striking such limiting language where the elimination of that language would substantially extend the operation of the enactment beyond the scope contemplated by all of its language.

It is axiomatic that an act in violation of the provisions of the organic law may not be validated by popular vote, apart from any amendment to the constitution.

Observation: The question sometimes arises whether a constitutional statute may subsequently be amended by an unconstitutional one. An unconstitutional act that purports to amend a prior constitutional statute cannot accomplish that objective, and the unconstitutional act, having no effect, can amend nothing; instead, the applicable law is provided by the statute as worded prior to the unconstitutional amendment.

206 By amendment of constitution

Various principles are applicable to the question whether an unconstitutional statute may be validated by amendment of the constitution (as contrasted with amendment of the statute). An unconstitutional statute has been held not validated by a subsequent constitutional amendment which does not ratify and confirm the statute, but merely authorizes the enactment of such a statute. But in other jurisdictions the view has been taken that a constitutional amendment may have the effect of ratifying as of their respective dates legislative acts which have been declared void as inconsistent with the constitution prior to such amendment. In the case of a constitutional amendment having a prospective effect, a statute antedating the amendment, and in violation of it, may be consolidated and recodified, and, as consolidated and recodified, be constitutional. On the other hand, statutes in conflict with the constitution may be validated by a constitutional amendment which expressly or impliedly ratifies and confirms them, provided such validation does not impair the obligations of a contract or divest vested rights. But it has also been held that a statute inconsistent with the constitution at the time the statute was enacted can, following the adoption of a constitutional amendment which, although obviating the inconsistency, is not self-executing, be given life only by re-enactment.

207 Generally

Although there are no degrees of constitutionality, so that an act is either constitutional or unconstitutional, nonetheless it is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is "stricken out" and rejected. This is sometimes referred to as the doctrine of elision.

Observation: Under the Uniform Statute and Rule Construction Act (USRCA), if a provision of a statute or rule or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the statute or rule which can be given effect without the invalid provision or application, and to this end the provisions of the statute or rule are severable.

Whenever a statute contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of the court so to declare and to maintain the act insofar as it is valid. The rules as to partial unconstitutionality apply with the same force to county and city ordinances and city charters as to legislative acts generally.

The natural corollary to the rule is as firmly affixed in the field of constitutional law as the rule itself. Thus, where it is not possible to separate that part of an act which is unconstitutional from the rest of the act, the whole statute must fall. Thus, whether or not the infirmity that avoids a part of a statute affects the entire act depends upon whether the constitutional and unconstitutional provisions are interdependent or inseparably connected.

The severability of a state statute is a state, not a federal, question. Accordingly, if state interpretations exist, they will be followed; if no construction by a state court is available, the United States Supreme Court ordinarily will remand the case to the state courts for construction.

There is nothing in the rule of severability which prevents the severance and elimination not only of words, clauses, or sentences, but also of whole sections of laws. Also, it has been recognized that a preamble of an act may be severed from the rest of a statute.

208 Application of rule, generally; tests of severability

The question whether the rule of severability should be applied to save partially unconstitutional legislation from being struck down in toto fundamentally involves a determination of and conformity with the intent of the legislative body which enacted the legislation. However, in determining what was the intention of the legislature, certain tests of severability have been developed. Thus, it is held that if, after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose, it does not necessarily follow that the whole act is void, and effect may be given to the remaining portions. In any case where it is sought to apply the general rule, the constitutional and unconstitutional parts should be so severable that the valid portion may be read and may stand by itself. The test for determining whether an unconstitutional portion of a statute is severable asks whether:

(1)the constitutional and unconstitutional parts are capable of separation such that each may be read and stand by itself;

(2)the unconstitutional part is so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the legislature if the clause or part is stricken out; and

(3)the insertion of words or terms is necessary in order to separate the constitutional part from the unconstitutional part and give effect to the former only.

And where a statute is constitutionally infirm because it contains multiple subjects, in violation of a requirement that statutes should be confined to one subject, the problem can normally be cured by severing those sections of the statute which cover the extraneous subjects. Thus, another test for severability is whether the constitutional portion of a statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed that Congress or the state legislature would have passed it independently of that which is in conflict with the Constitution.

In order for the unconstitutional portion of a statute to be separable from the constitutional portions, the invalid provision must be grammatically, functionally, and volitionally separable, and the remaining portion must be complete and capable of being executed independently of the rejected portion. But if it is impossible to tell what part of a statute is intended to be operative when some of its provisions are unconstitutional, it is wholly invalid. And the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes do not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications. [n8]

209 Application of rule in specific situations

In many specific factual situations, the courts have concluded that one unconstitutional part of a statute could be severed from the constitutional remainder of the statute so that the latter could be saved and enforced. These examples include statutes dealing with --

-- advocating or encouraging by teachers of homosexual activity.

-- child abuse and neglect.

-- clemency provisions purporting to restrict a governor's authority to grant commutations and reprieves.

-- filing requirements for challenging taxes imposed in excess of constitutional limitations on property taxes.

-- highway funding.

-- income tax deductions for those making political contributions.

-- income tax exemptions.

-- insurance rate increases.

-- multiemployer pension plans.

-- payroll deductions for state employee association dues.

-- prior restraints on disclosing trade secrets.

-- public service penalties for driving while under the influence of alcohol.

-- removal of elected trustees of a state university.

-- restrictions on the exportation of timber harvested from public lands.

-- retention of workers' compensation fund judges.

-- tort actions against local government units.

In numerous other specific factual situations, the courts have found that one part of a statute was not severable from the remainder of the statute, and therefore the entire statute must fail. These examples include statutes dealing with --

-- abortion licensing requirements.

-- campaign financing.

-- election of circuit court judges.

-- election statutes.

-- family farm rehabilitation and preservation.

-- forest fire suppression taxes.

-- general obligation bonds to fund cultural projects.

-- highway speed limits.

-- inclusion of cost estimates for increasing prison inmate population.

-- land sales.

-- powers of first-class counties.

-- premises liability.

-- strikebreakers act not limited to situations where violence occurs.

210 Partial invalidity of single section, subdivision, or amendment

The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable, so that some stand while others fall. The test is not whether they are contained in the same section, since the division of a statute into sections is frequently artificial, but whether the valid and the invalid provisions are inseparably connected in substance, and whether, after eliminating the invalid parts, enough remains to carry out the legislative intent.

The rule that the invalidity of a part of a statute does not extend to the whole statute unless the parts are interdependent is especially applicable to amendments and amendatory acts. Usually, when an amendatory exception to a statute proves unconstitutional, the original statute stands wholly unaffected by it. If a portion of an act which is an amendment of another act already in force is invalid and is inseparable from the remainder of the amendment, the entire amending act may be declared inoperative without in any way affecting the original act. And if the question of the constitutionality of a law prior to amendment is not raised, the court is without power to decide the question in an action involving the law as amended.

211 Invalidity of substantive portion of statute containing repealing provision

In cases in which statutes containing repealing clauses have been held to be unconstitutional, the general rule is that the clause containing the repeal is incidental to the rest of the statute, and that if the latter is invalid, the clause containing the repeal will likewise be deemed invalid, leaving the prior general law unrepealed. It must be pointed out, however, that the question in every case is whether the legislature intended that the repeal should take effect in any event -- that is, whether the repeal provision is severable. The courts sometime state that the clause of specific repeal in a substitute statute will fall with the act of which it is a part, unless it is clear that the legislature would have adopted the clause of repeal without providing the new legislation.

212 Generally

The question whether portions of a statute which are constitutional should be upheld while other portions are eliminated as unconstitutional primarily involves ascertaining the intent of the legislature. If the objectionable parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not necessarily render the entire statute invalid, but the statute may be enforced as to those portions of it which are constitutional. Even when material provisions in a statute as enacted must be eliminated because of their invalidity, the remaining valid provisions thereof are not rendered ineffective if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the

act itself that the legislature intended it to be effective only as an entirety and would not have enacted the valid part alone. In other words, the valid portions of a statute will be upheld if they are severable from the invalid portions and constitute a completely operative expression of the legislative intent. If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the remainder independently, and accordingly the entire statute is invalid. And it is a familiar rule that if the parts of a law are divisible and some of them are constitutional and others not, the constitutional provisions cannot be held valid if it appears that they would not have been adopted without the other parts; the portion which remains after deletion must express the legislative will independently of the void part. In determining whether the unconstitutional portion of a statute may be severed from the constitutional portion, the question is whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether; the answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots.

213 Expressed intent; savings or severability clauses

Occasionally, the legislature expressly states its will that the valid provisions of a statute be enforced in spite of any judicial determination that certain sections of the act are unconstitutional. Such an expression of the will of the legislature is entitled to great weight and generally should be carried out by the courts. Saving clauses of this kind are recognized as valid and are not an invalid delegation of legislative authority or a presentation of an inconsistent alternative. The effect of such a statutory declaration is to create, not the presumption of entirety in effect ordinarily accorded to statutes, but an opposite presumption of separability. An uncodified saving clause favoring severability, however, adds little to the basic presumption of severability, for such a clause is merely declaratory of an established rule of construction; it is an aid merely, not an inexorable command. Where a separability clause is included, the burden is upon the assailant to show the inseparability of the statutory provisions.

A saving clause clearly evidences a legislative intention not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the statute which would render them invalid should not be indulged. The saving clause is not absolute, for the reason that it is merely an aid to interpretation, and not an inexorable command. It is to be given a reasonable interpretation and does not operate to save provisions which clearly would not have been inserted except upon the supposition that the entire act was valid. The rule that in order for a part of a statute to be upheld as separable, where another part is unconstitutional, they must not be mutually dependent on one another is in no way altered by a legislative declaration that the invalidity of a portion of a statute shall not affect the remainder. The courts have steadfastly declared that the presumption which a saving clause creates is rebuttable although in order to defeat the entire act such presumption must be overcome by considerations which make evident the inseparability of the provisions or the clear probability that, the invalid part being eliminated, the legislature would not have been satisfied with what remained.

When the presumption of separability which is created by such a provision in a statute is overcome by a showing of the indivisible character of the act in spite of the provision, the entire act must fall with any invalid portion.

214 Implied intent; effect of absence of saving clause

Absent a legislative declaration that the invalidity of a portion of a statute shall not affect the remainder, the presumption is that the legislature intended the act to be effective as an entirety or not at all, although the presumption is not conclusive, since severability ultimately depends on the intent of the legislature. This presumption places upon the supporter of the statute the burden of showing the separability of the provisions. Similarly, the fact that certain provisions of a statute are found in the same section with an invalid provision signifies a legislative intention that if the latter cannot be given effect, the former shall not be operative. It is, however, the duty of the courts, even though the legislature may not have expressed its will to that effect by including a savings clause, to sever the valid from the invalid provisions of a statute and preserve the former if they relate to a distinct purpose which is not dependent upon the invalid provisions.

215 Invalidity of inducement

It is a well-established rule regarding the severability of partially unconstitutional statutes that if the valid and the invalid parts of a statute are so bound together that the invalid part is a material inducement to the valid portion, the whole is invalid. This test is merely a means of ascertaining and carrying out the presumed intention of the legislature. If it appears that the invalid portion was designed as an inducement to pass the valid, the inference is that the legislature would not have passed the valid portion alone. On the other hand, where the invalid portion of an act or statute was not an in-

ducement for passage of the entire act or statute, the unconstitutional portion may normally be severed from the remainder, and the valid portions may be enforced independently.

216 Invalidity of provision which, although not inducement, is essential

One of the tests used to determine the intention of the legislature as to severability of a statute is whether the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead one to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part held to be unconstitutional. Whenever the ruling feature of a law or an essential part from which the remaining portions take their cast is unconstitutional, the act must fall as a whole; it cannot be presumed that the legislature would have enacted the statute without such part. If the portions of a statute rejected as in themselves unconstitutional are not merely incidental and subordinate so that they could be stricken out without impairing the efficiency of the act, their invalidity will render the entire law void.

It is clear that the invalidity of one section of a statute which is in material relation to its other portions so as to modify, restrict, or extend its application will cause the failure of such other portions also. Frequently a single part of an act may be of so great importance that although in itself it may not be an inducing cause for the enactment of the legislation, its invalidity may render the whole act void.

217 Invalidity of nonessential provision

Principles of elementary logic require the conclusion that a legislature does not intend that the abrogation of nonessential provisions of its enactments because they have been held unconstitutional by a court shall nullify essential provisions which are not constitutionally defective. Thus, it is almost invariably held that the invalidity of particular provisions of a statute will not require invalidation of the whole statute where such invalid provisions are nonessential, that is, where they may be eliminated and the remainder given effect without interfering with the just and proper working out of the general purposes of the act. Obviously, to be capable of separate enforcement, the valid portion must be independent of the invalid and must form a complete act within itself. [n83]

Stated differently, the principle is that where the part of an act that is unconstitutional does not enter into the life of the act itself, was not an inducement to its passage, and is not essential to its being, it may be disregarded and the rest remain in force. Thus, merely incidental details may be stricken out without impairing the general scheme of the enactment. And the unconstitutionality of the portion of a statute which applies to persons in one classification has been held not to render invalid another portion which contains a complete classification in itself.

218 Invalidity of exception or proviso

One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid, because such extended operation would not be in accordance with the legislative intent. In some of these cases, the exception of a particular group from the provisions of a general statute may have been a material consideration with the legislature in the passage of the act, and the courts may properly infer that it would not have been enacted if such group had not been excluded from its operation and protected from its provisions. The answer to the argument that if an exception makes a statute unconstitutional the exception should be disregarded and the statute held valid has been said to be that the courts have no lawmaking power and cannot extend a statute to cover that which is excluded by the legislature.

The rule is equally well settled that exceptions may be stricken out when doing so does not defeat the general intent of the legislature. Where an excepting provision in a statute is found unconstitutional, courts very generally hold that this does not work an enlargement of the scope or operation of other provisions with which that provision was enacted and which it was intended to qualify or restrain. The general provisions of the statute are not invalidated unless it clearly appears that the provisions of the exception are so intimately and inherently related to and connected with the general provisions to which it relates that the legislature would not have enacted the latter without the former.

219 Insufficient or invalid title

In accordance with the general principles governing the severability of statutes already discussed, where the title of an act is invalid because of a single subject and title requirement, or is otherwise insufficient, the rule is that the matters in the body of the statute not embraced are invalid, but the remainder of the act is not unconstitutional unless the parts are inextricably interwoven in the texture of the statute. As illustrative of statutes held to be partially valid despite insufficiency of the title are decisions involving --

-- a stop and frisk statute.

-- a statute relating to the eligibility of a mayor to succeed himself for one term.

-- the Uniform Narcotics Drug Law.

-- a shoplifting statute.

-- a statute increasing the amount of excise tax imposed on the sale of certain intoxicating liquors.

Observation: If some litigant lodges a constitutional challenge to legislation based on a single subject and title requirement before codification of the flawed legislation and prevails, then the resulting invalidation of the statute inures to the benefit of other persons adversely affected by legislation.

220 Invalidity as to part of subject matter

Statutes may be unconstitutional and void as to their application to a part of their subject matter and valid as to other parts, or, to state the problem more concretely, they may be constitutional in operation with respect to some persons and states of fact and unconstitutional as to others. If a statute is reasonably appropriate in its overall approach, it should be upheld, notwithstanding that it may be unconstitutional in special circumstances, especially when it is apparent that the legislature would want the act to prevail where constitutionally it may.

221 Cases or subjects beyond legislative jurisdiction

One class of cases in which a statute may be in part valid and in part invalid consists of laws enacted by a legislature in general terms, covering not only persons and property as to which the legislature clearly has the right to make laws, but apparently applying also to individuals and property protected from such legislation. A law may be unconstitutional and void in relation to particular cases, and yet valid to all intents and purposes in its application to other cases which differ from the former in material characteristics. In other words, where a statute has been passed by the legislature and, in relation to certain cases which it affects, some part of it is not within the competency of the legislative power or is repugnant to some provision of the constitution, such part may be adjudged void and of no avail, while all other parts of the act not obnoxious to the same objection may be upheld as valid and have the force of law. The rule which sustains portions of a law in and of themselves valid in their operation arises from the theory that a statute which is unsustainable in its literal terms because it is valid in some of its applications but not in others is to be read as though the latter were excepted from its operation.

The most common cases in which the field of legislation is restricted by implication are those in which certain individuals are protected from legislative interference by reason of the operation of the clauses prohibiting the impairment of the obligation of contracts, the passage of retrospective laws, and encroachments by Congress and the state legislatures respectively on each other's domain. Thus, an act of the legislature may be unconstitutional so far as it purports to operate retrospectively or to have retroactive application to past contracts, or to the extent that it is found to impair the obligation of a contract, and yet it may be valid and constitutional in other respects and as applied to future cases.

The general principle has also been applied to the large and important class of cases where state laws are partially invalid as interfering with interstate commerce. Such statutes have frequently been treated as severable and sustained to the extent of regulating commerce within the confines of the state. The reverse is the case where an act of Congress, while embracing subjects within its authority in regulating commerce, also includes subjects not within its constitutional power. If the two are so interblended in the statute that they are incapable of separation, the entire statute will be held to be repugnant to the Federal Constitution and nonenforceable.

222 Generally

One of the major contributions to the science of government that was made by the Constitution of the United States was its division or distribution of powers between the states and the Federal Government. The purpose of the division of powers between the federal and state governments pursuant to the Tenth Amendment is to protect the liberty of individual citizens from excessive concentration of power in a central government.

By the terms of the Constitution, certain powers are entrusted to the Federal Government alone, while others are reserved to the states, and still others may be exercised concurrently by both the federal and state governments. The United States Supreme Court long ago divided governmental powers into four classes:

.those which belong exclusively to the national government;

.those which belong exclusively to the states;

.those which may be exercised concurrently and independently by both; and

.those which may be exercised by the states, but only until Congress shall see fit to act upon the subject.

The two governments -- state and national -- must exercise their powers in such a manner that neither interferes with the free and full exercise by the other of its powers. The distinctive operations of the state and Federal Governments within their respective spheres are basic to a federal constitutional system, however complicated and difficult the practical accommodation to it may be. This system is a practical adjustment by which the national authority may be maintained in its full scope without unnecessary loss of local efficiency. The principle of separation of powers as between governments is implemented in many states by constitutional or statutory prohibitions against the holding by one person, at the same time, of a state office and an office under the United States, or under another state. The powers which are delegated by the Constitution to the Federal Government, either by its express terms or by necessary implication, are comprehensive and complete, without limitations other than those found in the Constitution itself. Since the government of the United States is supreme within its sphere of action, the principle is recognized that if a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence or to its exercise that the property or rights of individuals may thereby be incidentally affected. Moreover, the United States may perform its functions without conforming to the police regulations of a state. In general, the United States is not a foreign sovereignty as regards the several states.

223 Powers of Federal Government as delegated by Constitution; generally

The United States Constitution contains an enumeration of powers expressly granted by the people to the Federal Government. Because the federal powers derive from such a grant from the people, it is axiomatic that the United States is a government of limited, enumerated, and delegated powers, and that it cannot exercise any authority not granted by the Federal Constitution either in express words or by necessary implication. Thus, a federal court must identify a constitutional predicate for the imposition of any affirmative duty on a state.

Since the Federal Constitution is a delegation of powers by the people to the federal authority, in that measure it constitutes a denial to the people themselves of the exercise of the powers so delegated, as well as a denial of the right to the exercise of any powers inconsistent with the provisions of the Constitution.

The Tenth Amendment does not operate as a limitation upon the powers, express or implied, delegated to the national government; in acting within the scope of the powers delegated to the United States by the Federal Constitution, Congress does not exceed the limits of the Tenth Amendment despite what might be the concurrent, and even the adverse or onerous, effects of its legislation upon a matter otherwise within the control of a state.

224 Specific examples of delegated powers

Various federal powers, embodied in statutes, and federal activities that have been challenged as violations of the Tenth Amendment, have been upheld by the courts. These include --

-- the powers inherent in the federal bank robbery statute.

-- a provision of the Bankruptcy Act extending the period for redemption.

-- an act vesting in bankruptcy courts jurisdiction over the property of reorganizing debtors in state court litigation.

-- the federal powers embodied in the Age Discrimination in Employment Act.

-- the federal powers granted by the Economic Stabilization Act of 1970.

-- the imposition of a federal estate tax on marital property.

-- the federal powers embodied by the Hatch Political Activity Act, as applied to officers or employees of state or local agencies whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States.

-- the Social Security Act provisions requiring state and local governments to share in fiscal responsibility for welfare payments.

It is not a violation of the Tenth Amendment for a federal court to require, as part of a school desegregation order, that a local school district submit a levy to state tax collection authorities adequate to fund its budget, and to enjoin the operation of state laws that would limit or reduce the levy below that amount. And the 12-year statute of limitations of the Quiet Title Act is not unconstitutional under the Tenth Amendment insofar as it purports to bar claims to lands constitutionally vested in the states, inasmuch as such a limitation merely limits the time in which a quiet title suit against the

United States can be filed and does not purport to strip any state, or anyone else, of any property rights. Likewise, a tax code provision denying a federal income tax exemption for unregistered state and local government bonds does not violate the Tenth Amendment, even if treated as directly regulating states by prohibiting the outright issuance of bearer bonds, absent some evidence that the states were deprived of their right to participate in the national political process.

In a few cases, challenges to an alleged delegation of power to the Federal Government have been sustained, and federal acts have been held to be beyond the authority of the Federal Government. For example, the Low-Level Radioactive Waste Policy Act's "take title" provision, offering states a choice of either accepting ownership of waste generated within their borders or regulating such according to instructions of Congress, neither of which options could be constitutionally imposed as a freestanding requirement, has been held to be outside Congress' enumerated powers and infringed upon state sovereignty in violation of the Tenth Amendment.

225 Tests of whether powers have been delegated

Whenever a question arises as to whether the Federal Government has the right to exercise any particular authority, recourse must be had to the Constitution itself in order to determine whether such authority is found therein either by express words or by necessary implication. In construing a law of the United States, it is necessary to look to the Federal Constitution to see if the power is granted; but in construing the law of a state, it is necessary to determine whether the legislature is prohibited, by express words or by implication either in the federal or state constitutions, from enacting such a law.

226 Powers of states as reserved

The Tenth Amendment to the Federal Constitution specifies that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. At the same time, states cannot exercise powers which exclusively spring out of the existence of the national government which the Constitution does not delegate to them, and no state can say that it has reserved under the Tenth Amendment what it never possessed. Thus, the power to add qualifications or term limits for the federal offices of representatives and senator is not a part of the original powers of sovereignty which the Tenth Amendment reserved to the states and may not be exercised by them. Furthermore, while they may certainly petition or urge, neither the state's electors nor its legislature may control the state's delegates to the United States Congress in the performance of their congressional duties.

In the peculiar dual form of government in the United States, each state has the right to order its own affairs and govern its own people except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. In fact, the United States Supreme Court has said that the essence of federalism is that the states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold. In other words, states retain a significant measure of sovereign authority; but they do so only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.

As compared with the Federal Government, the state governments are recognized as governments of unenumerated powers, and state power is regarded as reserved power, rather than granted or delegated power. While the Tenth Amendment has been characterized as a truism and a tautology, it is not without significance, since it expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the states' integrity or their ability to function effectively in a federal system. It has been pointed out, in this connection, that the purpose of the doctrine of Tenth Amendment immunity is to protect the states from federal intrusions that might threaten their "separate and independent existence."

227 Simultaneous and unrelinquishable supremacy of state and Federal Governments

Although the Federal Government and the states exist within the same territorial limits, each form of government, whether federal or state, is simultaneously supreme within its sphere, the former as to all powers granted, expressly or impliedly, under the Federal Constitution, and the state as to all other powers. There can be no loss of separate and independent autonomy to the states through their union under the Constitution, since the preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution in all its provisions looks to an indestructible union composed of indestructible states. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the Federal Constitution.

Where Congress exceeds its authority relative to the states, a departure from the constitutional plan cannot be ratified by the "consent" of state officials, as the Constitution does not protect the sovereignty of the states for the benefit of the

states or state governments as abstract political entities, or even for the benefit of public officials governing the states, but rather the Constitution divides authority between the federal and state governments for the protection of individuals. Therefore, the constitutional authority of Congress cannot be expanded by the "consent" of a state governmental unit whose domain is thereby narrowed. Nor, for that matter, may a federal agency give detailed "marching orders" to state agencies on discovering that all the agencies are working toward the same general objective, for that would countenance a novel and serious intrusion on state autonomy.

Although a particular provision of the Federal Constitution may seemingly be applicable in a particular case, its controlling effect is limited by the essential nature of the powers of government reserved to the states when the Constitution was adopted. Moreover, a widespread similarity of local conditions cannot confer upon Congress powers reserved to the states by the Federal Constitution.

228 Retained powers of "the people"

The Ninth Amendment to the United States Constitution provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people. While the Ninth Amendment has sometimes been dismissed by writers as a redundancy adding nothing to the rest of the Constitution, the Supreme Court has said that a careful reading of the words and history of the amendment indicates that it was intended to play a role in our constitutional scheme and ought not to be so lightly dismissed. Based on historical evidence, the Ninth Amendment appears to have been added to the Constitution to preserve, against encroachment by the Federal Government, individual rights embedded in state law until such rights are modified or abolished by state authorities, by a judicial determination of unconstitutionality, or by a demonstrated interference with the proper scope of federal authority.

The Ninth Amendment does not withdraw rights expressly granted to the Federal Government, and if a grant of power to the Federal Government is found, an objection, based upon the Ninth Amendment, of invasion of the rights must fail.

The Supreme Court has held that the integrity of the family unit is protected by the Ninth Amendment. However, the Amendment has been held not to confer substantive rights in addition to those conferred by other portions of the Constitution.

A wide variety of statutory powers exercised by the federal and state governments have been sustained as not violative of the Ninth Amendment.

229 Sovereignty of states; generally

The original thirteen states existed prior to the adoption of the Federal Constitution and before that time possessed all the attributes of sovereignty. All of these attributes except those surrendered by the formation of the Constitution and the amendments thereto have been retained. But the sovereign power of the states is necessarily diminished to the extent of the grants of power to the Federal Government in the Constitution, and it is subject to the restraints and limitations of the Constitution.

New states, upon their admission into the Union, become invested with equal rights and are subject only to such restrictions as are imposed upon the states already admitted. Under this rule, which is referred to as the "equal footing" doctrine, there can be no state of the Union whose sovereignty or freedom of action is in any respect different from that of any other state, including those states constituting the original 13 states.

230 Incidents of state sovereignty; examples

Under any government of limited powers, such as the United States of America and the 50 states which compose the Union, "sovereignty" is the supreme power which governs the body politic. The governments of the several states and the Federal Government are each sovereign, and yet the sovereignty of the states is essentially different from the sovereignty of the Federal Government; the one is less supreme than the other.

It has always been acknowledged in American constitutional law that the states, as sovereign entities, possess fully what is known as the police power, except as restrained by the United States Constitution. Because the health and safety of their citizens are primarily, and historically, matters of local concern, states traditionally have had great latitude under their police powers to legislate in order to protect the lives, limbs, health, comfort, and quiet of all persons. Consistent with this principle, it is generally recognized that under our federal system, the states possess primary authority for defining and enforcing the criminal law.

The principle of sovereignty has also been the basis for the courts' recognition of the states' power to fashion tort law, marriage and family law, and property law. A traditional right of sovereign states with respect to property is the power of eminent domain, and American constitutional law has always recognized that the American states possess this power. Likewise, the management of state parks is clearly a traditional state function.

The authority of a state's people to determine the qualifications of the state's most important government officials, including state court judges, lies at the heart of representative government, and is reserved under the Tenth Amendment and guaranteed by the provision in Article IV, ß 4 of the Federal Constitution guaranteeing every state a republican form of government.

A state may validly regulate activities, persons, and property within its jurisdiction, with knowledge that it will thereby influence matters beyond such jurisdiction, and that the influence will be far-reaching, where such regulation is vital to the welfare of the state's inhabitants, and where external consequences are but incidental to the solution of internal problems, so long as its regulation does not violate a valid federal statute.

The general principle of jurisprudence that the sovereign cannot be sued without its own consent applies with full force to the several states of the Union; no suit is maintainable against the state either in its own courts or in the courts of a sister state, by its own citizens, by the citizens of another state, or by the citizens or subjects of a foreign state, unless the state has given its consent or otherwise waived its immunity. Nevertheless, the Eleventh Amendment does not bar a claim against a state official in his individual capacity for violating the due process rights of a plaintiff while exercising responsibility pursuant to his or her official position.

Observation: States, though sovereign, are not immune from suits by the Federal Government.

The disciplining of lawyers is generally considered to be within the sovereign powers of the states. The states may also define the defenses to claims, including the defense of immunity, unless the state rule is in conflict with some federal law. In addition, they may prescribe the relevant qualifications for their jurors, although no member of the community may be excluded from jury service on account of race. And it is normally considered to be within the power of a state to establish procedures through which its laws are given effect, including those related to the burden of producing evidence and the burden of persuasion.

The power of taxation is inherent in sovereignty as an incident or attribute thereof, being essential to the existence of an independent government; thus, the right to tax exists apart from constitutions and, without being expressly conferred by the people, resides in the state governments as well as the national government.

231 Express limitations upon state sovereignty

The United States Constitution, as originally drafted, contained a number of specific limitations upon sovereignty of the states. The provision primarily concerned with detailing the limitations upon states is Article I, ß 10. Among the provisions of Article I, ß 10 is a clause providing that no state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility. Another provision of Article I, ß 10 states that no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; that the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and that all such laws shall be subject to the revision and control of the Congress. Article I, ß 10 further provides that no state shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

Another constitutional limitation upon the states is the provision in Article I, ß 4 that states' controls of elections for United States Senators and Representatives are subject to such laws as Congress may pass. Article VI further limits the ability of the states to determine qualifications for United States Senators and Representatives by providing that no religious test shall ever be required as a qualification to any office or public trust under the United States.

Article IV of the Constitution imposes certain obligations upon the states. Thus, in Section 1 it provides that the states must give full faith and credit to the public acts, records, and judicial proceedings of every other state. Section 2 requires the states to give the citizens of each state all privileges and immunities of citizens in the several states, and also

requires the executive of one state to deliver up to another state fugitives from justice within its borders. Another provision of Article IV explicitly holds the states to a republican form of government.

Subsequent amendments to the United States Constitution have imposed many significant limitations upon the sovereignty of the states. In fact, the United States Supreme Court has said that the principles of federalism that might otherwise be an obstacle to congressional authority were necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation"; those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty. Thus, the Thirteenth Amendment prevents the states from condoning slavery or involuntary servitude. The Fourteenth Amendment tells the states that certain persons are citizens of the state, and prohibits the states from denying to citizens of the United States their privileges and immunities, and from denying to all persons due process of law and equal protection. The Supreme Court has held, moreover, that the Tenth Amendment, reserving nondelegated powers to the states, cannot save state legislation prohibited by the subsequently enacted Fourteenth Amendment. Furthermore, legislation enacted by Congress in furtherance of its duty under the Fourteenth Amendment to see that equal protection of the laws is afforded to all citizens supersedes state laws in conflict with such duty. However, because legislation to enforce the guarantees of the Fourteenth Amendment imposes congressional policy on a state involuntarily, and because it often intrudes on traditional state authority, a court should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment.

The Fifteenth Amendment prohibits the states from denying the right to vote because of color, and, comparably, the Nineteenth Amendment disallows the power of the states to deny the voting right because of gender. And the Twenty-Fourth Amendment prohibits the states from denying the right to vote in federal elections by requiring poll taxes.

232 Implied limitations upon state sovereignty

There are many significant limitations upon state sovereignty implied from the Federal Constitution's express grant of certain powers to the Federal Government. In some instances, the grant is interpreted as exclusive and necessary, stripping the states of all power in the area. Examples of the major subjects thus removed from the sphere of state influence or activity are bankruptcy and patents. There are also implied limitations upon the states in their attempts to tax the Federal Government and its agents.

233 Effect of sovereignty upon relations with other states

While for all national purposes embraced by the Federal Constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws, in all other respects the states are necessarily foreign to and independent of each other, when regarded as local governments. The sovereignty of each state implies a limitation on the sovereignty of all sister states, a limitation express or implicit in both the original scheme of the Constitution as well as the Fourteenth Amendment. Each state's sovereign power ends at the boundaries which separate it from the other sovereign states of the union, even though actions it takes within its borders may have an effect on other states and their citizens. However, it has been recognized that states are owed by each other as well as by the Federal Government the mutual respect of sovereigns, or what is called "comity."

Article III, ß 2 of the United States Constitution provides that the judicial power of the United States shall extend to controversies between two or more states, and that the Supreme Court shall have original jurisdiction in those cases in which a state is a party. Thus, one state can be sued in an original action in the United States Supreme Court by another state when the latter is a proper plaintiff.

234 Generally

Although the Federal Government is one of delegated and enumerated powers, it is universally recognized that that which is implied in the Constitution is as much a part of it as that which is expressed. Accordingly, a power may be implied whenever necessary to give effect to a power expressly granted. It is therefore recognized that it is not indispensable to the existence of any power claimed for the Federal Government that it can be found specified in the words of the Constitution or that it is clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined or from them all combined. The powers arising from reading together some or all of the specifically conferred powers are at times denominated "resulting powers."

In international and foreign affairs, the Federal Government need not rely upon any affirmative grants of power in the Constitution, inasmuch as it has all the powers needed to effectively operate as a sovereign in international relations. Other "sovereign" powers include --

-- the power to protect each state from foreign invasions.

-- the power to make such international agreements as do not constitute treaties.

-- the power necessary for the government to successfully honor its obligations to other nations under the law of nations.

-- the power to protect persons in federal employment.

-- the power to protect the integrity of all federal elections.

-- the power to protect individuals' federally created or federally guaranteed rights.

235 Congressional powers and discretion

The general principles which govern the doctrine of implied powers find important application in defining the limits of congressional power. The Constitution of the United States includes a provision specifically empowering Congress to enact all laws which may be necessary and proper to carry into effect the powers expressly granted to it. But the powers which the Constitution grants are expressed in general terms, leaving to Congress, from time to time, the adoption of its own means to effectuate legitimate objects and to mold and model the exercise of its powers as its own wisdom and the public interests shall require. Thus, Congress in the exercise of sound discretion must determine in what manner it will exercise a power which it possesses.

It is firmly established that grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect.

The judicial department cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. Consequently, where an act of Congress is not prohibited and is really calculated to effect any of the objects entrusted to the Federal Government, the courts will not undertake to inquire into the degree of its necessity, since this would be beyond the province of the judicial department and would trespass on legislative ground.

There are limits to the implied powers of Congress. If the means employed should have no real, substantial relation to the public objects which government may legally accomplish, if they should be arbitrary and unreasonable beyond the necessities of the case, or if Congress in the execution of its powers should adopt measures which are prohibited by the Constitution, such enactments would unquestionably be held unconstitutional and void. Thus, Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. Congress has, for example, no authority to compel states to provide for the disposal of radioactive waste generated within their borders, even though Congress has substantial power under the Constitution to encourage states to do so.

Any provision of an act of Congress ostensibly enacted under a power granted by the Constitution which is not naturally or reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within the power reserved to the states, is invalid and cannot be enforced.

The conditions under which congressional powers are exercised will not change the nature of those powers, although powers ordinarily dormant may be called into action. While an emergency may not call into life a power which has never lived, nevertheless an emergency may afford a reason for the exertion of a living power already enjoyed.

236 Basic rule of noninterference

The rule is well recognized that the national and state governments are each to exercise their powers so as not to interfere with the free and full exercise of the powers of the other. Thus, no state may interfere with the free and unembarrassed exercise by the Federal Government of all powers conferred upon it. Moreover, in situations where federal and local enactments overlap in their effects on nongovernmental activities, to the extent possible, there must be a reconciliation of both statutory schemes rather than invalidating one completely.

The states are not mere political subdivisions of the United States, and state governments are neither regional offices nor administrative agencies of the Federal Government; the Federal Constitution instead leaves to the several states a residuary and inviolable sovereignty, reserved explicitly to the states by the Constitution's Tenth Amendment, with which the Federal Government may not interfere. Therefore, whenever the federal power is exercised within what would otherwise be the domain of state power, it should invade the state's power as little as possible, and the justification for its exercise must clearly appear.

The Constitution does not give Congress any authority to require the states to regulate, no matter how powerful the federal interests that may be involved in a particular matter; rather, the Constitution gives Congress authority in many instances to regulate certain matters directly and to pre-empt contrary state regulation. It has been observed, in this connection, that certain kinds of federal interference, such as the coercive commandeering of the states' legislative processes that effectively compels the states to adopt a federal regulatory program, are by their very nature such a major interference as to violate the Tenth Amendment, regardless of how light a burden is imposed on state officials; nonetheless, Congress may require state regulatory authorities to implement federally promulgated rules requiring adjudication of disputes arising under a federal statute.

Apart from the clear prohibition against the Federal Government directing the states to legislate or to regulate, the severity of the burden placed on the states by the Federal Government and the degree of interference with their sovereign powers is the touchstone for determining whether national legislation is so onerous as to threaten the effectiveness of the states in our federal system. With respect to interference by the Federal Government with a state's exercise of its powers, the general rule is that Congress may not settle the public policy of any state as to intrastate matters, though in the exercise of constitutional powers Congress may by its statutes declare policy for both the people and the state.

237 Cooperative federalism

Despite the basic rule of noninterference, the Federal Constitution is not to be construed so as to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual states with a view towards increasing harmony within the federalism created by the Constitution. Conflicts between state and federal regulations are not to be sought where none clearly exist.

At one and the same time, there are constitutionally permissible methods, short of outright coercion, by which Congress may urge the states to cooperate and to adopt legislative programs and uniform regulatory schemes consistent with federal interests. These methods include attaching conditions to the receipt of federal funds and, where Congress has authority to regulate private activity under the commerce clause, offering states the choice of regulating that activity according to federal standards or having state laws pre-empted by federal regulation as part of a program of "cooperative federalism." And it is not a violation of the Constitution or an interference with state sovereignty for the Federal Government to provide monetary incentives for compliance by a state or states with a federal regulatory scheme, since the states thereby retain the ability to set their own legislative agendas by either accepting or rejecting the incentives, and state governmental officials remain accountable to their local electorates.

238 Enforcement of federal law by state courts

Federal laws are enforceable in state courts, and such is not to be considered an interference by state courts in the nation's complicated scheme of dual sovereignty. This relationship exists, not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum -- although both might well be true -- but because the Constitution and laws passed pursuant to it are as much laws in the states as are the laws passed by state legislatures. The supremacy clause makes those laws "the Supreme Law of the Land," and charges state courts with the coordinate responsibility to enforce those laws according to their regular modes of procedure. Under the supremacy clause, state courts are obliged to enforce rights conferred by the United States Supreme Court even if the state constitution does not provide such rights. Although a state may allocate decisionmaking authority among its own tribunals as it pleases, it is not free to prefer its internal processes to those of federal courts and to decline to respect federal judgments.

A state court may not deny a federal right, when the parties in controversy are properly before it, in the absence of a "valid excuse," and state court's excuse for denial of a federal right is not valid if it is inconsistent with or violates federal law, since the supremacy clause forbids state courts to dissociate themselves from federal law because of any disagreement with its contents or any refusal to recognize the superior authority of its source. However, the requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it the requirement that the state create a court competent to hear a case in which a federal claim is presented.

239 Federal power as exclusive of or concurrent with state power

It has been stated that the powers granted by the Federal Constitution to the national government may be divided into two general classes, exclusive powers and concurrent powers, and that exclusive federal powers are of two types: (1) those which cannot be exercised by the states under any consideration, and (2) those which cannot be exercised by the state without the express consent of Congress.

The United States Supreme Court at an early date laid down a broad formula which from that time has been the general principle governing the possibility of the states' exercise of concurrent powers. The Court held that the states may exercise concurrent or independent power in all cases except three:

.where the power is lodged exclusively in the Federal Constitution;

.where it is given to the United States and prohibited to the states; and

.where, from the nature and subjects of the power, it must necessarily be exercised by the national government.

By reason of the provision of the United States Constitution that the Constitution and laws passed in pursuance thereto shall be the supreme law of the land, if a law passed by a state in the exercise of its acknowledged powers comes into conflict with an act of Congress, the state law must yield. The federal and state legislatures cannot occupy the position of equal opposing sovereignties, because the Constitution declares as supreme the laws passed by Congress. The principle is therefore fundamental that state laws must yield to acts of Congress within the sphere of its delegated power, even though the state laws were enacted in the exercise of acknowledged or uncontroverted powers, since giving effect to the directions of state laws which are contrary to statutes enacted by Congress pursuant to its delegated power would result in the federal statute no longer being the supreme law of the land, as is required by the Federal Constitution. Hence, state legislatures, and, indeed, all state agencies, are barred from taking action which conflicts with valid federal law. However, where a state act is enforced in the presence of coexisting consistent national legislation, then the supremacy clause of the Federal Constitution is complied with, since the supremacy of the laws of the United States is in no manner impaired. Moreover, Congress may by statute consent to state legislation within a particular area.

240 Power of states to provide greater protections of individual rights than are required by Federal Constitution

In the areas of individual rights and civil liberties, the United States Constitution, where it is applicable to the states, provides a floor below which state court decisions may not fall. But states are free to provide greater protections in their criminal justice systems, although not lesser ones, than the Federal Constitution requires. Thus, states may confer procedural protections of liberty interests that extend beyond those minimally required by the Constitution of the United States. And individual states are free to interpret their own constitutions as imposing more stringent constraints, for example, on police conduct than does the Federal Constitution, although they may not interpret them as imposing less stringent constraints.

241 Effect of action of Congress; pre-emption doctrine

Where Congress has legislated upon a subject which is within its constitutional control and over which it has the right to assume exclusive jurisdiction and has manifested its intention to deal therewith in full, the authority of the states is necessarily excluded, and any state legislation on the subject is void. The relative importance to the state of its own law is not material when there is a conflict with a valid federal law; any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law must yield. Moreover, the state has no right to interfere or, by way of complement to the legislation of Congress, to prescribe additional regulations and auxiliary provisions for the same purpose. Congress' authority to act within the scope of its powers so as to displace state power is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature.

Perhaps less obvious, but no less well established, is the rule that when Congress passes a law in a field of legislation common to both federal and state governments, the act of Congress supersedes or pre-empts all inconsistent state legislation. This rule is generally known as the doctrine of pre-emption.

The pre-emption of state law is sometimes required by the terms of a federal statute; however, even when there is no express pre-emption, any proper application of the doctrine must give effect to the intent of Congress. In regulating a matter within the concurrent field of legislation, Congress speaks for all the people and all the states, and it is immaterial that the public policy embodied in the congressional legislation overrules the policies theretofore adopted by any of the states with respect to the subject matter of such legislation.

Pre-emption does not occur in every case in which the Federal Government has legislated in a field of concurrent state-federal power, however. A state law is superseded by a congressional law only to such an extent as the two are inconsistent. For instance, an act of Congress may occupy only a limited portion of the field of regulation of a particular subject matter, leaving unimpaired the right of the several states to enact regulations covering other aspects of the subject. The pre-emption doctrine does not and cannot withdraw from the states either the power to regulate where the activity

regulated is a merely peripheral concern of federal law, or the authority to legislate when Congress could have regulated a distinctive part of a subject which is peculiarly adapted to local regulation but has not done so.

242 Clear statement rule

The "clear statement" rule requires that any federal encroachment upon a state's sovereignty may be made only by a clear statement of congressional intent to do so. In considering whether a federal law pre-empts a state law, the United States Supreme Court starts with the assumption that the historic police powers of the states are not to be superseded by the federal statute unless that was the clear and manifest purpose of Congress. Where Congress does not clearly state in its legislation whether it intends to pre-empt state laws, the courts normally sustain a local regulation of the same subject matter unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states.

The pre-emption of state law by a federal statute or regulation is not favored in the absence of persuasive reasons, either that the nature of the regulated subject matter permits no other conclusion or that Congress has clearly and unmistakably so ordained. Absent an obvious repugnancy between the federal and state legislation, a state will be held barred, as a consequence of federal legislation, from legislating within a particular area only where the intention of Congress to exclude state action is clearly manifested.

243 Tests applied to determine pre-emption

The United States Supreme Court has set forth three tests that it uses to determine if a state statute has been pre-empted or superseded:

.whether the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it;

.whether the federal statutes touch a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject; and

.whether enforcement of the state statute presents a serious danger of conflict with the administration of the federal program.

Observation: Federal agency regulations are not themselves controlling on the issue of pre-emption of state law by a federal scheme, but where Congress has entrusted an agency with the task of promulgating regulations to carry out the purposes of a statute, the United States Supreme Court will consider whether the regulations evidence a desire to occupy the field completely. Pre-emption should not be inferred, however, simply because the agency's regulations are comprehensive.

The Supreme Court has also stated that a federal statute may pre-empt state law by:

.express pre-emption, using express or explicit pre-emptive language;

.field pre-emption, where the scheme of federal regulation is so pervasive as to leave no room for supplementary state regulation; and

.conflict pre-emption, where either (a) compliance with both state and federal law is impossible, or (b) a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

In determining whether state and federal laws are so inconsistent that the state law must give way, the United States Supreme Court will consider the relationship between the state and federal laws as they are interpreted and applied, not merely as they are written. And in determining whether Congress, through legislation, has so occupied a particular field as to preclude state legislation, the Supreme Court, in order to discover the boundaries of the particular field involved, will look to the federal statute itself, read in the light of its constitutional setting and its legislative history.

As respects federal legislation of limited scope, in determining whether state regulation has been pre-empted by federal action, the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulations and to occupy a limited field. Such an intent on the part of Congress is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.

244 Determination of existence of conflict with state action

Basic to the ascertainment of the effect of the enactment of federal legislation upon state legislation within the same legislative area is the question whether there is an actual conflict between the federal and state legislation. A test of

whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives. Another test of whether a state statute or regulation is void under the supremacy clause is whether compliance with both federal and state statutes or regulations is a physical impossibility or whether the law or regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

In a borderline case, where congressional authority is not explicit, the crucial question is whether state authority can practically regulate a given area; if it cannot, federal authority governs. If state laws within a field of concurrent power are identical with those of Congress, the court may find a congressional motive to exclude the states.

245 Effect of inaction of Congress; "doctrine of silence of Congress"

The mere fact that Congress has the power to legislate in regard to a certain subject does not in all instances exclude the right of the states to legislate on the same subject. There is a field of concurrent power in which the state may legislate until the power is actually exercised by Congress. In other words, in the absence of any federal legislation on the subject, a state may enact valid statutes as to certain matters within Congress' potential control; but Congress may suspend the state laws by occupying the field in the exercise of the granted power. Enforcement of a state act in the absence of national legislation does not violate the Federal Constitution, since the supremacy of the laws of the United States is in no manner impaired. However, there is an important principle, commonly referred to as "the doctrine of the silence of Congress," which is sometimes applied to determine whether a state may enact regulations in a field of legislation in the absence of any direct expression of the will of the Federal Government.

Several criteria have been established for determining when the doctrine of the silence of Congress should be applied so as to bar legislation by the several states. The power of Congress is exclusive whenever a state enactment would clearly be repugnant to the exercise of authority by the United States government or whenever the subject matter is so national in character as to require uniformity of regulation affecting all the states alike. With respect to activities carried on by the United States itself, the silence of Congress is insufficient to authorize state regulation, such regulation being impermissible where Congress does not affirmatively declare its submission to such regulation. On the other hand, where the subject matter upon which the power is to be exercised is local and limited in its nature or sphere of operation, the rule is well established that the several states may prescribe regulations until Congress intervenes. And state action may be upheld where Congress has authorized the executive branch in general or a specific federal agency in particular to act in a given area, but that authority has not been, or never was, exercised.

246 aration; generally

One of the fundamental principles of the American constitutional system is that the governmental powers are divided among the three departments of government -- the legislative, executive, and judicial -- and that each of these is separate from the others. The principle of separation of the powers of government operates in a broad manner to confine legislative powers to the legislature, executive powers to the executive department, and those which are judicial in character to the judiciary. The Constitution's central mechanism of separation of powers depends largely upon a common understanding of what activities are appropriate to legislatures, to executives, and to courts, and this separation of powers doctrine requires the courts to leave intact the respective roles and regions of independence of the coordinate branches of government. It is, for example, up to the legislatures, not the courts, to decide on the wisdom and utility of legislation; and federal courts, rather than administrative agencies, have the responsibility to resolve issues of statutory construction.

The objective of the Federal Constitution was to establish three great departments of government: the legislative, the executive, and the judicial. The first was to pass the laws, the second, to approve and execute them, and the third, to expound and enforce them. The separation of powers doctrine forbids one branch of government to exercise powers properly belonging to another branch. And since the constitutional distribution of the powers of government was made on the assumption by the people that the several departments would be equally careful to use the powers granted for the public good alone, the doctrine is generally accepted that none of the several departments is subordinate, but that all are coordinate, independent, and coequal; and that if the government is to function constitutionally, it is necessary for each of the repositories of constitutional power to keep within its power, and wherever possible to defer to each branch's own interpretation of its constitutional duties and responsibilities. However, notwithstanding the deference each branch must accord the others, the judicial power can no more be shared with the executive branch than the President can share with the judiciary his veto power or Congress share with the judiciary the power to override a presidential veto.

The true meaning of the general doctrine of the separation of powers seems to be that the whole power of one department should not be exercised by the same hands which possess the whole power of either of the other departments. Thus, it is generally recognized that constitutional restraints are overstepped where one department of government attempts to exercise powers exclusively delegated to another, and that officers of any branch of the government may not usurp or exercise the powers of either of the others.

247 aration; generally Importance and purpose of principle

The principle of the separation of the powers of government is fundamental to the very existence of constitutional government as established in the United States. The division of governmental powers into executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people. It prevents the exercise of autocratic power, is a matter of fundamental necessity, and is essential to the maintenance of a republican form of government. In short, this division of power provision serves to create a governmental structure "resistant to the forces of tyranny."

Although there may be a blending of powers in certain respects, in a broad sense the safety of our institutions depends in no small degree on the strict observance of the independence of the several departments. Each constitutes a check or balance upon the exercise of its power by any other department, and, accordingly, a concentration of power in the hands of one person or class is prevented, and a commingling of essentially different powers in the same hands is precluded.

248 aration; generally As express or implied constitutional requirement

Frequently, there appears in a state constitution an express division of the powers of government among the three departments; and all persons charged with official duties under one of the departments may be forbidden from exercising any of the functions of another except as expressly permitted by the constitution itself. A state constitutional provision that no person belonging to one department shall exercise the powers properly belonging to another is to be strictly applied.

A constitutional requirement with respect to the separation of the three departments of the government which exists in a state constitution is generally held to refer to the state government and state officers, and not to the government of municipal corporations or counties.

In the Federal Constitution, and in a few of the state constitutions, no specific provision is made for a separation of governmental powers. Under these constitutions, however, and even under the constitutions in which such a clause has actually been inserted, irrespective of the existence of such a distributing clause, the creation of the three departments may operate as an apportionment of the different classes of powers. Where the provision that the legislative, executive, and judicial powers shall be preserved separate and distinct is not found in a constitution in terms, it may exist there in substance in the organization and distribution of the powers of the departments.

A distributive clause in a state constitution prevents the exercise of the functions of one department of the government by another department, but has no relation to the exercise or division of the powers of one particular branch of the government by the officers who comprise that branch and does not control the question of which one of several executive officers should perform an executive function.

249 aration; generally Practical difficulties in separation

It is easy to generalize about the boundary of legislative, executive, and judicial power, but distinguishing the arbitrary point where one begins and the other leaves off is a very different matter. The separation of governmental powers into legislative, executive, and judicial is abstract and general, and while the separation is intended to have a practical purpose, the courts have often had to struggle to maintain the separation of powers doctrine in its pristine rigor, while laboring to devise novel theories to permit government to function in spite of it. That the Federal Constitution's system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it is deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of government power.

Although a state constitution may define three separate branches of power, there is generally no attempt to compartmentalize them, and perhaps, in truth, there can be no absolute and complete separation of all the powers of a practical government. The powers of one department of government have always depended on or have been aided in some way by those of another. Moreover, there is sometimes an overlapping or blending of powers of separate departments.

Historically, what constitutes executive, legislative, or judicial power has been determined in the light of the common law and what the powers were considered to be at the time of adoption of the Constitution. And the dividing lines between the respective powers of the three departments is generally determined on a case-by-case basis, by a consideration of the language and intent of the Constitution as well as of the history, the nature, and the powers, limitations, and purposes of the republican form of government established and maintained under the federal and state constitutions.
250 arate departments
Each of the three branches of government has exclusive cognizance of the matters within its jurisdiction, and is supreme within its own sphere, and none has the right to invade the sphere of operation of either of the others. Nevertheless, the United States Supreme Court has authority to interpret the claims of the other branches with respect to powers alleged to derive from their enumerated powers; and it is emphatically the Court's duty and responsibility to say what the law is. Additionally, it should be understood that separation of powers does not mean an entire or complete separation of powers or functions, which would be impracticable, if not impossible.

In the exercise of the powers of government assigned to them severally, the departments normally operate harmoniously and independently of each other, and the action of any one of them in the lawful exercise of its own powers is not subject to control by either of the others. Each department of government must exercise its own delegated powers, and unless otherwise limited by the federal or state constitutions, each exercises such inherent power as will protect it in the performance of its major duty; one department may not be controlled or even embarrassed by another department unless the Constitution so ordains.

But the doctrine of separation of powers and the independence of each branch to carry out its constitutional functions carries with it a responsibility of each branch to cooperate with the other branches to accomplish the purpose of each constitutional provision; and each branch, in exercising its prerogatives and authority, must have regard for the prerogatives and authority of the others. Furthermore, no branch of government may deny to another the funds necessary for it to operate and perform its constitutional functions. However, the doctrine of separation of powers does not preclude the prosecution of members of the executive, legislative, and judicial branches for violations of the law, nor does it bar prosecution of former members of the three branches where appropriate.

The completeness of the separation of the three departments and their mutual independence does not extend to the point that those in authority in one department can ignore and treat the acts of those in authority in another department, done pursuant to the authority vested in them, as void, of no effect, and not binding on every department of the government. Moreover, one department may have limited, lawful control over the other departments, as is illustrated by the power of the chief executive to practically annul the judgments of the judiciary in certain cases through the exercise of the pardoning power and the power of the chief executive to nullify the actions of the legislature through the use of the veto.
251 arate departments
Although the separation of powers doctrine provides that the whole power of one department should not be exercised by the same persons who possess the whole power of either of the other departments, this doctrine is ordinarily applied only to those powers which, because of their nature, are assigned by the Constitution to one of the departments exclusively. Hence, it does not necessarily follow that an entire and complete separation of powers is either desirable or was ever intended. There may be -- and frequently are -- areas in which the executive, legislative, and judicial powers blend or overlap; and many officers whose duties cannot be exclusively placed under any one of these heads. It has even been suggested by some that there is a headless "fourth branch" of government, consisting of independent agencies having significant duties in both the legislative and executive branches, but residing not entirely within either, for purposes of determining whether such agencies may exercise both legislative and executive powers.

The courts have perceived the necessity of avoiding a narrow construction of a state constitutional provision for the division of the powers of the government into three distinct departments, for it is impractical to view the provision from the standpoint of a doctrinaire. Thus, the modern view of separation of powers rejects the metaphysical abstractions and reverts instead to a more pragmatic, flexible, functional approach, giving recognition to the fact that there may be a certain degree of blending or admixture of the three powers of government. Moreover, the doctrine of separation of powers has never been strictly or rigidly applied, and indeed could not be, to all the ramifications of state or national governments, since the government would prove abortive if it attempted to follow the policy of separation of powers to the letter.

The doctrine does not require such a rigid classification of all the incidental activities of government as to make it improper for one branch of the government to use any technique or method of procedure already adopted by another branch of the government. At the same time, it is the duty of the courts to attempt to enforce the true meaning, intent, and purpose of the constitutional provision declaring the distribution of governmental powers, notwithstanding that there is necessarily some mingling and overlapping of powers between the three departments of government which cannot be avoided. And it remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by any other. Thus, the constitutional ban on passage of bills of attainder by Congress should be understood as aimed at denying what is essentially a judicial function to the legislature.
252 arate departments Illustrations in the Federal Government
The doctrine as to separation of the powers of government has never been strictly applied to all the ramifications of the national government, and there are many instances in which powers or functions have blended or overlapped. For example, acting in a quasi-judicial role, the President can create administrative tribunals, and may perform certain other judicial acts under the Constitution. Not only can he create courts-martial, but he can disapprove and set aside their findings and punishment. The President can also constitute military commissions to try individuals for violations of the laws of war. He or his representative may also prescribe the manner of death for violation of a federal statute calling for the death penalty.

By promulgating administrative rules and regulations, the President may, in effect, legislate, and such "legislation" has the force and effect of law unless overturned by the courts or Congress. For instance, the United States Sentencing Commission, whose members are appointed by the President, may prescribe the manner of serving criminal sentences. In doing so, it is not inappropriately engaged in the promulgation of legislation in violation of the doctrine of separation of powers. And the President is so far made a part of the legislative power that his assent is required to the enactment of all statutes and resolutions of Congress. This, however, is so only to a limited extent, for a bill may become a law, notwithstanding the refusal of the President to approve it, by a vote of two-thirds of each house of Congress.

The President may, on extraordinary occasions, convene both Houses of Congress, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. Furthermore, the Vice President of the United States is the President of the Senate, and may vote in cases where the Senate is evenly divided.

So, also, the Senate is made a partaker in the functions of appointing officers and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. And although the President is made the commander in chief of the Army and Navy of the United States, the Constitution vests the sole power to declare war in the Congress, and further provides that the Congress has the power to raise and support armies which the President commands.

The Senate also exercises the judicial power of trying impeachments, and the House of Representatives exercises the power of preferring articles of impeachment. Congress may, moreover, suspend the writ of habeas corpus in cases of rebellion or invasion where the public safety may require it.
253 arate departments Illustrations in state government
There is not a constitution of any one of the states which does not to a certain extent blend the powers of government, notwithstanding declarations in bills of rights to the contrary.

Although the ascertainment of facts based on evidence taken in the course of a formal hearing is normally associated with the exercise of judicial power, it may be entirely proper in the exercise of legislative or executive power and may be accompanied by the power to compel the attendance of witnesses and the power to punish for contempt. Similarly, although it is normally the duty of the legislature to make the determinations of fact on the basis of which legislation is to become effective, that duty may properly be devolved on members of the executive branch. Also, it is important to note that under the provisions of most state constitutions, although the legislative power of the state is vested in a senate and house of representatives or general assembly, the lawmaking power includes control or supervision by the governor, insofar as the governor has the power of approval or veto of legislation.
254 aration of state governmental powers
The Constitution of the United States does not in terms prohibit one department of the government of a state from exercising the powers which are conferred upon either of the other departments, nor does the Constitution impose the doctrine of separation of powers upon the states. In fact, as a matter of federal constitutional law, the states are free to allo-

cate the lawmaking function to whatever branch of state government they may choose. Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect of some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. The blending of the powers of different departments in the same official does not violate the guaranty of a republican form of government. A state constitution may therefore unite certain legislative and judicial powers in a single person without violating the requirements of the Federal Constitution.

255 Generally

The executive power is the power to execute the laws, that is, to carry them into effect, as distinguished from the power to make the laws and the power to judge them. Ultimately, all executive power is granted by the Constitution, and the executive branch can exercise no power not derived from that instrument.

The executive power is said by some to be more limited than the legislative powers, extending merely to the details of carrying into effect laws enacted by the legislature as they may be interpreted by the courts -- the legislature having the power, except where limited by the Constitution itself, to stipulate what actions executive officers shall or shall not perform. As are all of the three main branches of government, the executive branch is independent of the other two. However, unlike the monarchs of old, the President of the United States, though entitled to extreme deference in the conduct of his constitutional duties and obligations, is not above the law. And in accordance with the general principle of the separation of powers, the executive department cannot generally usurp or exercise judicial or legislative power, and, by the same token, the executive power may not be encroached upon or interfered with by the judiciary. It is as important to preserve and protect the powers of the executive branch of the government and its ability to function as it is to preserve and protect the other branches.

The executive power also includes the power to administer the laws, and thus the promulgation of rules and regulations for such purpose is also an executive function. Very often, executive power is taken to be the same as administrative power, or a power or function is described as "executive or administrative," and some state constitutions expressly recognize the executive power as including the administrative. The distinction between "executive" and "administrative" is that the former involves carrying out a legislatively completed policy while the latter involves legislative discretions as to policy in completing and perfecting the legislative process. Executive power includes the power to issue pardons and reprieves, and to grant or revoke paroles; the exclusive authority to decide whether to prosecute and which alternative charges to pursue rests with the executive branch.

The President has the authority to conduct the nation's foreign policy, and to recognize a foreign government.

The right to make appointments to public office may, under certain circumstances, be exercised in whole or in part by other departments; however, that power has in a number of instances been regarded as an executive function. The executive power need not, in all cases, be exercised directly and exclusively by the chief executive, but may be, in some instances, and most frequently is, delegated to subordinates.

256 Limitations as respects judiciary

Executive officers cannot exercise or usurp judicial powers or functions, such as passing upon the constitutionality of legislation, deciding whether a plaintiff or potential plaintiff has standing to maintain an action in court for judicial review of an agency's action, amending or modifying court orders, or sentencing criminals; nor can they interfere with the courts, or prevent them from exercising their inherent judicial functions. On the other hand, it will not be held that an executive officer has performed a judicial function in performing his or her statutory duties which are executive in character. Moreover, acts of the President and other executive officers have been held not to constitute an exercise or usurpation of judicial power under many different circumstances.

Observation: The separation of powers doctrine requires administrative agencies in the executive branch to follow the law of the federal circuit whose courts have jurisdiction over a particular cause of action, and in the absence of a controlling decision by the United States Supreme Court, the respective Courts of Appeal express the law of that circuit.

Although the executive branch may not force members of the judicial branch to perform duties that are not in keeping with their judicial roles and the independence of the judiciary, the power of the President, under a provision of a federal statute, to appoint members of the United States Sentencing Commission -- at least three of whom must be federal judges -- and to remove such members for neglect of duty, malfeasance, or other good cause, does not afford the President influence over the functions of the judicial branch of the Federal Government or undue sway over the members of that

branch, in violation of the constitutional principles of separation of powers, because: (1) the President's power to appoint judges to other positions has never been considered sufficient to corrupt the integrity of the judiciary, and, in any case, the President's power of appointment to the Commission is limited by the requirement that judicial appointees be selected from a list submitted by the Judicial Conference of the United States; (2) the President has no power to affect the tenure and compensation of Article III judges as judges, so that even if the statute authorized the President to remove judges from the Commission at will, the President would have no power to coerce the judges in the exercise of their judicial duties; and (3) Congress has not given the President unfettered authority to remove Commission members, but has insulated such members from removal except for good cause.

It has been held that the presence of a retired Supreme Court justice and an active circuit judge on a Presidential Commission to investigate organized crime does not violate the constitutional separation of powers doctrine, where the service of the judges was voluntary, judicial membership on the advisory commission did not prevent it from carrying out its duties, and participation by the judges did not disrupt the operation of the courts. However, at least one court has taken a contrary position.

257 Actions of administrative agencies

As a part of the executive branch of government, an administrative tribunal is not a court; it is not a part of the judicial branch of government, for purposes of the separation of powers doctrine. And as a general rule, administrative agencies have no general judicial powers. Thus, an administrative agency does not have the power, without statutory authority, to overrule or ignore a judicial precedent. Moreover, the general rule is that an administrative agency may not determine constitutional issues, and is not authorized to consider or question the constitutionality of a legislative act or to declare unconstitutional statutes which it was created to administer and enforce.

However, an agency in the executive branch may be called upon to adjudicate disputes of a type that might ordinarily otherwise be resolved by a court, and may perform such adjudicatory functions in harmony with the separation of powers doctrine, provided that there is an opportunity for judicial review of the agency's final determination. And it is widely recognized that an administrative agency may have judicial and legislative, or legislative, executive, and judicial, powers or functions, sometimes softened by the word "quasi." or stated to be in nature judicial and legislative. The power to determine controverted rights to property by means of a binding judgment typically is vested in the judicial branch, but the separation of powers principle does not bar administrative agencies of the executive branch from working in tandem with the judicial branch to administer justice under appropriate circumstances, and administrative fact-findings are a necessary aspect of administrative discretion rather than an exclusively judicial function. In addition, while the doctrine of separation of powers is fundamental to our form of government, it is not absolute, and it does not require that administrative agencies never consider the constitutionality of an administrative action.

258 Limitations as respects legislature

"Legislative power" is the power to make, alter, and repeal laws and to formulate legislative policy; and "executive power" is the power to put laws enacted by the legislature into effect. It is clear that the executive can neither encroach upon the functions of the legislature nor interfere in its duties; neither can the executive discharge the functions of the legislature in any manner by so acting in his or her official capacity that his or her conduct is tantamount to a repeal, enactment, variance, or enlargement of legislation. For instance, the separation of powers doctrine precludes the executive branch, in expending public funds, from disregarding legislatively prescribed directives and limits pertaining to the use of such funds.

Observation: It is not always an usurpation of the legislative function for an administrative regulation to create liability.

Since the whole legislative power is assigned to the legislative department of the government, the general rule is that there exists no power in the executive department to suspend the operation of statutes.

But no unconstitutional encroachment on the powers of the legislative branch occurs when the chief executive participates in the lawmaking power by means of exercising his veto power; nor is it a violation of the separation of powers doctrine for the executive branch to act within its statutorily delegated powers in other respects.

Observation: The Supreme Court has pointed out that the central role or purpose of the speech or debate clause of the Federal Constitution, which provides that members of Congress shall not be questioned in any other place for any speech or debate in either House, is to prevent intimidation of legislators by the executive branch.

It is widely recognized that, notwithstanding the prohibition against the exercise of legislative functions by the executive branch of the government, administrative agencies may lawfully exercise quasi-legislative and quasi-judicial functions.

259 Generally

The power to maintain a judicial department is an incident to the sovereignty of each state, and it is an imperative duty of the judicial department of government to protect its jurisdiction at the boundaries of power fixed by the state constitution. Under the doctrine of the separation of the powers of government, judicial power, as distinguished from executive and legislative power, is vested in the courts as a separate magistracy. While the separation of powers doctrine prevents another branch of government from encroaching upon the judiciary, the same principle bars the courts from intruding into the affairs of the legislative or executive branches, since the separation of powers doctrine requires the courts to leave intact the respective roles and regions of independence of the coordinate branches of government.

One of the important objects of the Federal Constitution is the designation of rights and, in its great outlines, the judiciary is clearly discernible as the primary means through which these rights may be enforced. The most fundamental protection afforded by the doctrine of separation of powers lies in the power of the courts to test legislative and executive acts by the light of a constitutional mandate and, in particular, to preserve constitutional rights, whether of an individual or a minority group, from obliteration by the majority.

In a general way the courts possess the entire body of judicial power, and the judiciary may not assign its powers to either of the other branches of government. The other departments cannot, as a general rule, properly assume to exercise any part of the judicial power, nor can the constitutional courts be hampered or limited in the discharge of their functions by either of the other two branches. Indeed, it is the duty of such other branches of government to facilitate the administration of justice by the judiciary.

260 Judicial functions, generally

The federal and state constitutions are the common sources of the power and authority of every court, and all questions concerning the jurisdiction of a court must be determined by those instruments, with the exception of certain inherent powers which of right belong to all courts. Therefore, unless the power or authority of a court to perform a contemplated act can be found in the constitution or the laws enacted thereunder, it is without jurisdiction and its acts are invalid. At least in the absence of a textually demonstrable constitutional commitment of an issue to a coordinate political department, it is presumed by the United States Supreme Court that justiciable constitutional rights are to be enforced through the courts.

Various tests have been suggested for determining what are or what are not judicial powers. The protection of constitutional rights is a core function of the judiciary. It is, of course, the ultimate prerogative of the judiciary to determine whether an act of Congress is consistent with the United States Constitution, or to determine whether an act of a state legislature is consistent with the state's constitution, and the power, under certain circumstances, to review decisions of the separate departments of government -- judicial review -- is an exclusive power of the judiciary. Clearly and unarguably, the construction and interpretation of a constitution is a judicial function.

Sentencing those who violate criminal laws is an important function of the judiciary. The separation of powers doctrine also inherently places responsibility for regulating the practice of law in the state supreme courts. The judiciary has exclusive power and responsibility over court records and court personnel. And it is peculiarly and exclusively the judiciary's function to determine whether a jury award in a civil case exceeds an amount that the state and federal constitutions will allow without violating the due process rights guaranteed to all citizens of the state and the United States.

Where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and where the decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial. Thus, where the facts out of which a moral or legal obligation is claimed to arise are disputed, the contention falls within the province of the courts, under the distribution of governmental powers prescribed by the constitutions of the states.

It is the role of the courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.

The courts declare the law as it is, resolving every doubt in favor of its constitutionality. They also apply and administer the law. But courts have no power to establish periods of limitation within which certain types of cases may be brought.

261 Interpretation of Constitution; maintaining aration of powers

Under the American system of constitutional government, among the most important functions entrusted to the judiciary are the interpreting of constitutions and, as a closely connected power, the determination of whether laws and acts of the legislature are or are not contrary to the provisions of the federal and state constitutions. In fact, the greatest deterrent to the enactment of unconstitutional statutes by a legislative body is the power of courts to invalidate statutes.

The customary deference accorded to the judgments of Congress is particularly appropriate when Congress has specifically considered the question of an act's constitutionality. However, while the Supreme Court will not ignore Congress' conclusion about an issue of constitutional law, it is the Supreme Court's task in the end to decide whether Congress has violated the Constitution, particularly where Congress has concluded that its product does not violate the First Amendment.

The judicial powers include the important function of preventing departmental encroachment, such as marking out the boundaries of each department and remedying the invasions by either of the territory of the other.

262 Distinctions between judiciary and executive and legislative departments

The distinction between legislative or executive functions and judicial functions is sometimes difficult to point out. While the line which separates the power to make laws from the power to interpret and apply them is not exactly defined, and is sometimes not spelled out in state constitutions, broadly speaking, a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts, under laws supposed already to exist; legislation, on the other hand, looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.

263 Distinction between judiciary and administrative agencies and tribunals

What essentially distinguishes a court from an administrative agency is that under our constitutional system of separation of the three branches of government, courts are part of the judicial branch, whereas administrative agencies and tribunals are part of the executive branch of the government. When an administrative agency addresses a question of law by construing or applying a particular statute, courts will grant some deference to legal determinations that fall within the agency's expertise; however, it is a function of the courts to interpret the law, and courts are in no way bound by an agency's legal interpretation. Administrative adjudications are not Article III proceedings to which either the "case or controversy" or prudential standing requirements apply; within their legislative mandates, such agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court. Furthermore, an administrative agency cannot refuse to obey a court's directive.

Congress and various state legislatures frequently delegate policymaking authority to administrative agencies, which authority obviously cannot be delegated to, or imposed on, federal or state courts. When Congress or a state legislature has done this, through express delegation or introduction of an interpretive gap in the statutory structure, the extent of judicial review of the administrative agency's policy determinations may be limited. A federal court, whose power is strictly judicial, is properly reluctant to preclude any federal agency's deliberations of policy since a federal agency, which is controlled by the political branches of the Federal Government, is constitutionally better suited than a federal court to render policy decisions.

264 Generally

The courts, like other agencies of the government, are subject to controlling constitutional provisions and valid existing laws; and in performing their judicial functions, courts must be careful to keep within the constitutional limits of their own powers and to proceed by due process of law.

Observation: Subject only to the regulation of Congress, each federal court exercises the entire judicial power of the United States, not the judicial power constitutionally limited by the boundaries of a particular district; because the district court's jurisdiction is always potentially or actually coextensive with the boundaries of the United States, due process only requires that a defendant in a federal suit have minimum contacts with the United States in order for a federal court to have jurisdiction.

Under all circumstances, it is the imperative duty of the courts to support the Constitution, and no court has the right to declare any public policy that clearly contravenes or nullifies the rights declared in the Constitution. Accordingly, courts are without power to deny a citizen rights guaranteed to him or her by organic law.

The federal courts and most state courts have no power to issue advisory opinions.

The judiciary should cautiously abstain from any invasion or usurpation of the powers which are properly exercisable by any other departments of the government, and should refrain from nullifying their acts except where they are plainly and clearly in conflict with constitutional provisions. The courts may not and will not substitute their judgment with reference to matters properly within the domain of the legislative and executive departments. Thus, a court will not legislate or assume the role of a law enforcement agency.

The judicial branch of government may not invade the legislative or executive branches so as to correct alleged mistakes or wrongs arising from any asserted abuse of discretion in exerting a power given.

265 Determination of political or nonjusticiable questions; generally

The justiciability of a controversy depends not upon the existence of a federal statute, but upon whether a judicial resolution of that controversy would be consonant with the separation of powers principles embodied in the Constitution, to which all courts must adhere even in the absence of an explicit statutory command. The political question doctrine, which derives from the separation of powers doctrine, excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or state legislatures or to the confines of the executive branch. The rule has also been held applicable to ordinances enacted by city councils.

The fundamental characteristic of a nonjusticiable "political question" is that its adjudication would place a court in conflict with a coequal branch of government in violation of the primary authority of that coordinate branch. Thus, the courts will not rule upon questions which are exclusively or predominantly political in nature rather than judicial.

The mere fact that a suit seeks protection of a political right does not always mean that it presents a nonjusticiable political question. Nonetheless, certain political questions cannot be resolved by judicial authority without violating the constitutional principle of separation of powers. Features characterizing a case raising a nonjusticiable political question are:

.a textually demonstrable constitutional commitment of the issue to a coordinate political department;

.a lack of judicially discoverable or manageable standards for resolving it;

.the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

.the impossibility of a court's undertaking an independent resolution without expressing any lack of the respect due to the coordinate branches of government;

.an unusual need for unquestioning adherence to a political decision already made; and

.the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In invoking the "political question" doctrine, a court acknowledges the possibility that a constitutional provision may not be judicially enforceable, and such a decision is very different from determining that a specific congressional action does not violate the Constitution; that determination is a decision on the merits and reflects the exercise of judicial review, rather than abstention from judicial review that would be appropriate in the case of a true political question.

The mere fact that a political question is incidentally involved in a controversy does not necessarily make such controversy nonjusticiable. And the fact that political questions are beyond the competency of the courts to determine or even pass on, in the absence of express constitutional authority, does not mean that the exercise of political powers may not give rise to justiciable questions under the courts' power to construe, declare, and apply the law and the Constitution.

266 Particular issues as presenting political or nonjusticiable questions

Among those matters that have been held to be political or nonjusticiable are --

-- whether a state's right to a republican form of government had been violated.

-- how best to enforce the nation's immigration laws to minimize the number of illegal aliens crossing its borders.

-- the wisdom of particular zoning regulations.

-- certain foreign relations controversies, including controversies over the recognition or nonrecognition of particular governments, negotiations with foreign countries for permission to impose United States law in their nations' territories, and whether a state of war existed, or when it ceased to exist.

-- controversies pertaining to foreign commerce controversies.

-- certain issues concerning the makeup of the military.

However, the political question doctrine did not preclude Supreme Court review of the validity of a state law requirement that one must own real property in order to serve on a government board. An alien's suit challenging a section of the Immigration and Nationality Act authorizing one house of Congress, by resolution, to invalidate a decision of the executive branch to allow a particular deportable alien to remain in the United States has likewise been held not to present a nonjusticiable political question on the asserted ground that the alien was merely challenging Congress' authority under the naturalization and necessary and proper clauses of the Constitution.

Whether the National Security Agency complied with its own regulations or violated the constitutional rights of a former employee of an NSA contractor when it revoked her security clearance based on her refusal to take polygraph examination has been held not to constitute a nonjusticiable political question. And determination of the propriety of conversion rate used by the Civil Aeronautics Board to establish cargo liability limitations for air carriers under the Warsaw Convention has likewise been considered not to involve a political question.

Constitutional challenges to apportionment are justiciable. Similarly, it has been held that recognition of a cause of action to challenge racial gerrymandering in drawing congressional districts does not threaten excessive judicial entanglement into a state's districting process, despite the complexity of the districting process that prevents adoption of bright-line rules.

267 Impermissibility of imposition of nonjudicial functions upon judiciary

One application of the general principle of separation of the powers of government is the rule which has itself been described by some authorities as a rudimentary principle of constitutional law, namely, that on judges as such no functions can be imposed except those of a judicial nature. The purpose of the general rule that executive or administrative duties of a nonjudicial nature may not be imposed on judges holding office under Article III of the United States Constitution is to maintain the separation between the judiciary and the other branches of the Federal Government by ensuring the independence of the judicial branch and ensuring that judges do not encroach upon executive or legislative authority or undertake tasks that are more properly accomplished by the other branches. [n17]

In some states it has been held to that courts and judges not only shall not be required, but shall not be permitted, to exercise any power or to perform any trust or to assume any duty not pertaining to, or connected with, the administering of the judicial function, and that the exercise of any power or trust or the assumption of any public duty other than such as pertains to the exercise of the judicial function is not only without constitutional warrant, but is against the constitutional mandate in respect of the powers they are to exercise and the character of the duties they are to discharge.

However, the Supreme Court has held that the Constitution does not prohibit Article III federal judges from undertaking extrajudicial duties on a voluntary or appointed basis, so long as it is understood that these judges may not be forced by one of the other two branches of government to take on such duties. In other words, the Constitution, at least as a "per se matter," does not forbid judges from wearing two hats; it merely forbids them from wearing both hats at the same time. The Supreme Court also has held that the separation of powers doctrine is not violated by provisions in the Ethics in Government Act creating a "Special Division" of federal judges with authority to appoint independent counsel when requested to do so by the executive branch. Such a provision does not pose any threat to the impartial and independent federal adjudication of claims within the judicial power of the United States.

Observation: The rule that the judiciary may not perform nonjudicial functions does not apply when such functions are reasonably incidental to the performance of judicial duties. Thus, while the power of appointment is normally executive in its nature, such power may constitutionally be conferred upon specified courts. Moreover, it is not beyond the legislative power to clothe the judge or judges of a particular court with authority to create a probation department and appoint persons to positions therein as an adjunct to the judicial function.

268 Limitations as respects executive branch

The judiciary may not encroach upon, share, or usurp the executive function, because the separation of powers doctrine mandates that the judiciary remain independent of executive affairs, and vice versa. Encroachment cannot be accomplished by judicial review of purely executive powers.

Although the separation of powers doctrine does not bar every exercise of jurisdiction over the President of the United States, a court, before exercising such jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the executive branch. When judicial action is needed to serve a broad public interest, as when a court acts not in derogation of the separation of powers but to maintain their proper balance or to vindicate the public interest in an ongoing criminal prosecution, the exercise of jurisdiction over the President of the United States is warranted; but, in the case of a merely private suit for damages based on the President's official acts, it is not. Claims simply alleging that the President of the United States has exceeded the President's statutory authority are not "constitutional" claims subject to judicial review, because: (1) the United States Supreme Court's cases do not support the proposition that every action taken by the President, or by another executive official, in excess of the official's statutory authority necessarily violates the Federal Constitution; (2) in cases in which the President concedes, either implicitly or explicitly, that the only source of the President's authority is statutory, no constitutional question is raised and such cases concern issues only of statutory interpretation; and (3) if every claim alleging that the President exceeded the President's statutory authority were considered a constitutional claim, then the "constitutional" exception allowing judicial review would be broadened beyond recognition, as the distinction between claims that an official exceeded the official's statutory authority, and claims that the official's actions violated the Constitution, is too well established.

Closely akin to the problem of judicial encroachment upon executive power is the situation in which an attempt is made to obtain judicial interference in executive functions. It is a general rule that the courts are without the power to interfere in the performance of executive duties, particularly where the executive must exercise discretion in the performance of constitutional or statutory powers.

The general rule that a court is without jurisdiction to judicially review the discretionary functions of the executive branch of government is, however, subject to the exception that a court is empowered to prevent a member of the executive branch from acting ultra vires, in bad faith, or arbitrarily. Furthermore, the judicial branch of government has authority to assure that an agency of the executive branch of government performs its statutorily mandated duties. Where a statute purports to authorize the courts to review matters within the constitutional province of the executive power, that statute is itself unconstitutional.

It is not the function of the judiciary to entertain private litigation which challenges the legality, the wisdom, or the propriety of conduct of the executive, who is acting within his constitutional powers. In other words, so long as a public governing body acts within the limits of its legal powers and jurisdiction, the exercise of its judgment and discretion is not subject to review or control by the courts at the instance of citizens, taxpayers, or other interested persons, in the absence of a statute authorizing such review or control. However, a court order directing a local government body to levy its own taxes is a judicial act within the power of a federal court. While the lack of authority in the judiciary to restrain a lawful exercise of power by another department of government, where a wrong motive or purpose has impelled the exertion of the power, may render abuses temporarily effectual, the remedy lies not in the abuse by the judicial authority of its function, but in the people, upon whom reliance must be placed for the correction of such abuses.

269 Particular executive actions not subject to judicial review

In accordance with the general rule that the judiciary will not encroach upon the executive branch of government, the courts will not interfere with executive actions relating to executive, political, international, prosecutorial, military, immigration, internal revenue, or law enforcement matters, or with the executive's commutation of sentences, or the appointment, compensation, suspension, or removal of government officers or employees. And judicial inquiries into the private motivation or reasoning of administrative decisionmakers is a substantial intrusion into the functions of the executive branch of government and is impermissible.

270 Limitations as respects legislative branch; encroachment; judicial legislation

A fundamental principle, scrupulously observed by the courts, is that the judiciary may not encroach upon the functions of the legislature or usurp its powers. In the absence of limitations imposed by either the federal or state constitutions, a state legislature's power to legislate has been described as unlimited.

The federal lawmaking power is vested in the legislative, not the judicial, branch of government, and federal courts are bound to apply laws enacted by Congress with respect to matters over which it has legislative power. Unless a statute implies a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, a federal court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems. At the same time, however, it is the ultimate prerogative of the judiciary to determine whether an act of Congress is consistent with the United States Constitution.

The courts may not force the legislatures to enact legislation by mandamus or on behalf of private litigants. And unlike an administrative agency's denial of an exemption from a generally applicable law, which would be entitled to a judicial audience, a legislature's failure to enact a special law is itself unreviewable by the courts.

In line with the general rule of impermissibility of judicial legislation, it is held that the courts, in performing their function of construing statutes, may not interpolate words which the legislature has omitted. Thus, courts cannot, by an act of judicial legislation, add words of limitation to a statute expressed in general terms in order to sustain it, where its operation on the subject matter embraced in its terms is unconstitutional. Nor may they create exceptions to or substitutions in a legislative plan. By the same token, courts may not extend or enlarge a statute by interpretation.

A federal court is not free to rewrite a statutory scheme in order to approximate what it thinks Congress might have wanted had it known that its enactment was beyond its authority; rather, that task is for Congress. Nor does a state court ordinarily have any power to reform or rewrite a statute so as to make it conform to a presumed intention which is not expressed, although at least one state court has taken the position that a court, may judicially reform or rewrite statutes to preserve their constitutionality when doing so closely effectuates policy judgments clearly articulated by the enacting body, and where the enacting body would have preferred such reformed version of the statute over an invalid and unenforceable statute.

Observation: The fact that Congress might have acted with greater clarity or foresight in a given situation does not give the courts a carte blanche to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do, nor is the judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result.

The canon of construction that a court should strive to interpret a statute in a way that will avoid an unconstitutional construction is useful in close cases but is not a license for the judiciary to rewrite language enacted by the legislature.

Federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own concepts of prudent public policy, and only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to the statutory language be judicially implied.

271 Judgments as to wisdom, underlying motivation, necessity, and fairness of statutes

Courts do not sit to determine the wisdom of statutes, or fashion remedies that Congress has specifically chosen not to extend. With questions of wisdom, propriety, appropriateness, necessity, policy, fairness, or expediency of legislation or regulations, the courts simply have no concern.

Caution: A court's deference to Congress' factual findings does not foreclose the court's independent judgment of the facts bearing on an issue of constitutional law.

The courts should similarly be unconcerned with questions of legislative motivation. Indeed, the factfinding process and motivation of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. And in considering whether a particular expenditure is intended to serve general public purposes so as to be within Congress' spending power, the courts should defer substantially to the judgment of Congress.

272 Setting public policy

Courts admittedly are not well equipped or even permitted to establish public policy. In all cases of statutory construction, a court should begin with the words of the statute, and approach them with an understanding that its role is not to set public policy, but rather to discern the legislature's will. Courts should make policy in order to determine a duty only when the body politic has not spoken and only with the understanding that any misperception of the public mind may be corrected shortly by the legislature.

273 Interference with legislative function

The courts will not assume jurisdiction in any case which will amount to an interference by the judicial department with the legislature, since each department is equally independent within the powers conferred upon it by the Constitution. The courts have no power to interfere with or control the exercise by the legislature of the power belonging exclusively to that department. This rule is equally applicable to the adoption of county and municipal ordinances. Only when a statute or ordinance manifestly infringes upon a constitutional provision or violates the rights of the people should the judicial branch impede its operation.

The courts have no general supervisory authority over legislation; they are without power to review the exercise of legislative discretion; and during the process of legislation in any mode, the work of the lawmakers is not subject to judicial arrest or control or open to judicial inquiry. The courts have no power to enforce the mandates of the Constitution which are directed at the legislative branch of the government or to coerce the legislature to obey its duty, no matter how clearly or mandatorily imposed on it, with respect to its legislative function; and no court can interfere with the process of legislation to prevent the possible enactment of an unconstitutional measure.

Despite the fact that members of Congress and state legislatures are generally immune from arrest and other sanctions that might be otherwise imposed with regard to the performance of their official and legislative responsibilities and duties, they are no more above the law than is the President or members of the judiciary when they violate the general state and federal laws that are applicable to all other citizens.

Courts are even hesitant, on grounds of respect for the basic concept of distribution of powers, to intervene in the internal affairs of the legislature as a coordinate branch of government, since it is not the province of the courts to direct the legislature how to do its work. It is entirely the prerogative of the state legislature to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to act in accordance with its own procedural rules so long as constitutional questions are not implicated. However, there is some authority to the effect that judicial review may be undertaken to determine whether the legislature has complied with the constitutional prescriptions as to legislative procedures, for example, the procedure or process for overriding an executive veto. And the subject matter of a suit wherein a former congressional staff member alleged that her Fifth Amendment rights had been violated when she was discharged solely because of her sex has been deemed not to be nonjusticiable on the ground that judicial review of congressional employment decisions would necessarily involve a lack of respect for the coordinate branches of government.

274 Intrusion with respect to legislation pertaining to military affairs

The Constitution itself requires deference to congressional choices in the areas of national defense and military affairs, and the Supreme Court, which does not abdicate its ultimate responsibility to decide constitutional questions, is nonetheless particularly careful not to substitute its judgment of what is desirable for that of Congress or its own evaluation of evidence for a reasonable evaluation by the legislative branch. Judicial deference to the congressional exercise of authority is at its apogee when legislative action under congressional authority to raise and support armies and make rules and regulations for their governance is challenged.

Heightened judicial deference to Congress in military matters does not mean that Congress operates free of all constitutional restraint when legislating in that area or that the courts have a license to avoid deciding constitutional questions posed by litigants, but judicial deference when reviewing congressional decisionmaking in military matters is nonetheless essential.

The question of exemption from military service is not a matter belonging to the judicial power of the United States which the Constitution vests in the courts, but it is instead a part of the procedure of raising an army, which is vested in the Congress and its instrumentalities.

275 Generally

The enumeration of legislative powers contained in Article I of the United States Constitution, and the reservation in the Tenth Amendment of all other powers not delegated to the United States to the states or to the people, do not contradict, but instead complement each other. Solely as a matter of federal constitutional law, the states are free to allocate the lawmaking function to whatever branch of state government they may choose, and each state is free to interpret its own constitutional provision calling for a separation of the powers of government as either more strict or less strict than the federal constitutional provision on the same subject. As a practical matter, however, all of the states have allocated the lawmaking function to their own legislatures, which, in some states, are called general assemblies or various other

names, and in most states, with regard to the doctrine of separation of powers, the state constitutions are almost identical to the separation of powers provision in the Federal Constitution.

Observation: As far as local governments are concerned, there is no natural law of separation of powers, and the powers of local governments are separate only insofar as the state constitution makes them separate.

The legislature is one of the three main departments of government, and under the principle of the separation of governmental powers, the legislative power of the state is vested in the state legislature exclusively. Legislative power includes the power to make laws, and the discretion to determine the interests of the public. In this connection, it has been stated that the principal function of a legislature is not merely to make public contracts, but to make laws that establish the public policies of the state.

Whether actions taken by either house of Congress are, in law and fact, an exercise of its legislative power depends not on their form, but upon whether they contain matter which is properly to be regarded as legislative in its character and effect.

Observation: The separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate branches.

In some states, under the provisions of the state constitution, the legislative authority is subject to the initiative and referendum provisions specifically reserved to the people. However, absent a contrary provision in the state constitution, the legislature may amend or repeal a statute adopted by the electorate.

Observation: By conferring upon the legislative department the exclusive power to legislate, the people do not deprive themselves of doing so by and through the constitution itself, either in a new constitution or by means of amendment to an old one.

276 Extent of, and limitations on, power; generally

Congress may exercise only those powers enumerated in the Federal Constitution; its power is not absolute. However, in accordance with the doctrine that the state constitution is not a grant of power, but only a limitation, as far as the legislature is concerned, it is a recognized principle of constitutional law that except where limitations have been imposed by the federal or state constitutions, or by the valid treaties and acts of Congress, the power of a state legislature is unlimited and practically absolute; it extends to any subject within the scope of civil government. Thus, a state legislature does not act under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of the constitution, and as a rule, therefore, a legislature may do what the state and federal constitutions do not prohibit. So long as no constitutional limits are exceeded, the legislative will is supreme and must be obeyed by all other departments of the government. Stated another way, a constitution operates to limit legislative power only where it contains a clear prohibition, either express or implied, and constitutional restrictions and limitations on legislative power are not extended to include matters not covered.

The legislatures and Congress also may create remedies for civil wrongs, and they generally have authority to enact statutes to modify or change, for the future, the common law as established by judicial decisions, although in some states, the courts have held that while the legislature may not abolish a common-law right of action by a statute of repose or otherwise, it is not constrained in fashioning new rights unknown to the common law.

The legislature is the branch of government empowered to bestow subject matter jurisdiction upon the courts, and to determine the extent of a state's sovereign immunity. Moreover, it is empowered to make, interpret, and enforce its own procedural rules, and the judiciary cannot compel the legislature to act in accordance with its own procedural rules so long as constitutional questions are not implicated.

The enactment of statutes of limitations is also the prerogative of the legislature, and it is within the legislature's power to grant a party standing.

It is generally conceded that inherent power is reposed in legislative bodies to conduct investigations in the aid of prospective legislation and for the purpose of securing information requisite to the discharge of their functions and powers, and that this power may be exercised directly or through properly constituted legislative committees.

The power of punishment is vested in the legislature, not the judicial department, and it is the legislature, not the judiciary, which is to define a crime and ordain the general limits of its punishment. The legislature has great latitude in defining criminal conduct and in prescribing penalties to vindicate the legitimate interests of society, and the function of the legislature in this area is primary, its exercises fortified by presumptions of right and legality, and it is not to be interfered with lightly nor by any judicial conception of their wisdom or propriety.

The legislature also has exclusive power over deciding how, when, and for what purpose public funds shall be applied in carrying on the government.

The regulation and control of dangerous and deadly weapons is exclusively within the power of the legislature, not the judiciary.

277 Encroachment on executive; generally

Under the separation of powers doctrine, Congress may not invest itself, its members, or its agents with executive power. Thus, it is a fundamental principle of the American governmental system that the legislature cannot usurp the powers of the executive department by exercising or limiting functions of the latter.

The legislative and executive departments should be kept as distinct and independent as possible. The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the executive branch or a state, and state officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.

Although Congress and the state legislatures initially determine the content of a statute, which in turn determines the nature of the executive duty, they can thereafter control the execution of its enactment only indirectly, by passing new legislation.

Congress and the state legislatures cannot interfere with the President's or a governor's power to issue pardons and commute sentences. The fact that the Constitution bestows on the President the power to grant reprieves and pardons for offenses against the United States implies that the other two branches do not have that power.

Statutory rights and obligations are established by Congress and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner. Thus, the legislative branch may establish salaries for a wide range of positions in the executive branch of state government. The legislature may prescribe by statute the procedures which are reasonably necessary to effectuate a constitutional purpose. And the legislature has constitutional power to allocate executive department functions and duties among the offices, departments, and agencies of state government. No legislative encroachment on executive power is involved in legislation implementing an inherent executive power.

While the legislature may not limit or curtail the exercise of powers granted the executive by the constitution, it may exclude him or her from all executive power except with relation to those specific duties mentioned in the constitution, and may withdraw from him or her any powers and duties which it has conferred.

Executive action under legislatively delegated authority that might resemble "legislative" action in some respect is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require it: that kind of executive action is always subject to check by the terms of the legislation that authorized it, and if that authority is exceeded, it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.

278 Executive appointment powers

The so-called "Decision of 1789," in which the First Congress rejected a congressional role in the removal of executive branch officers, other than by impeachment, provides contemporaneous and weighty evidence of the meaning of the Constitution, since many of the members of the First Congress had taken part in framing that instrument. As a result of this "decision," the legislative branch may not encroach upon or usurp the power granted by the Constitution to the chief executive, whether the President of the United States or a governor, in reference to appointments, or the formulation of rules and regulations needed to execute the laws enacted by the legislature. A state legislature can neither enforce the laws which it has the power to make, nor, in the usual instance, appoint the agents charged with the duty of such enforcement.

Observation: The Ethics in Government Act restricting the Attorney General's power to remove independent counsel to only those instances in which he or she can show "good cause" does not impermissibly interfere with the President's exercise of his constitutionally appointed functions in violation of the separation of powers doctrine; an independent counsel is an inferior officer under the appointments clause and the President's need to control such counsel is not so essential to the functioning of the executive branch as to require as a matter of constitutional law that counsel be terminable at will by the President.

279 Imposition of executive functions upon judiciary

A state constitution which provides that the legislative, executive, and judicial departments, respectively, shall not exercise the powers of one another, prohibits the legislature, in the exercise of its legislative powers, from transferring from the executive to the judicial department powers expressly and exclusively conferred upon the executive department by the constitution. Even where there is no express constitutional provision for nonexercise by any one of the branches of government of the powers of any of the other branches, the imposition of executive powers upon the judiciary is frequently viewed as fatally inconsistent with the principle of separation of powers. Nonetheless, the United States Supreme Court has held that Congress' decision to require at least three federal judges to serve on the United States Sentencing Commission and to require those judges to share their authority with nonjudges does not unconstitutionally undermine the integrity of the judicial branch.

An extradition statute does not violate the separation of powers doctrine in requiring judges to conduct non-Article III extradition proceedings; only individual justices, judges, and magistrates, not federal courts, were subject to the statute and, since those judicial officers functioned as commissioners under the statute, they were not bound by the limits of Article III. And a statute is not invalid as improperly conferring executive powers where the actual power of the executive department is not really diminished. Also, it is permissible to confer upon the judiciary functions which, though executive, are reasonably incidental to the performance of judicial duties.

Some authorities have also taken the position that the exercise of the power of appointment to certain offices by the judiciary is not an encroachment on the power of the executive department, and consequently, statutes providing for the appointment of such officers by judges do not violate constitutional provisions providing for a separation of powers.

280 Interference with executive

It is a fundamental rule that the legislature may not infringe upon the constitutional powers of the executive department by interference with the functions conferred on that department by the organic law. However, the legislature may attempt to control the executive branch by passing amendatory or supplemental legislation and presenting such legislation to the governor for signature or veto, or by its power of appropriation, and the legislature may also hold committee hearings, conduct investigations, or request information from the executive branch.

The Supreme Court has held that an act directing the Administrator of General Services to take custody of the papers and tape recordings of the late President Nixon did not on its face constitute an impermissible interference by the legislative branch with matters inherently the business solely of the executive branch in violation of separation of powers principles.

281 Encroachment on judiciary; generally

The uniform view held in this country is that the legislature does not inherently possess any judicial power (except in the case of impeachments) or any mixed jurisdiction which is partly legislative and partly judicial. However, Congress is not barred from acting pursuant to its powers under Article I of the Constitution to vest decisionmaking authority in tribunals that lack the attributes of Article III courts, and, of course, Congress, subject only to Article III of the Constitution, is authorized to establish the jurisdiction of inferior federal courts.

Stated as a composite of the various expressions to be found in the reported cases, the rule is that the legislature may not invade, exercise, assume, usurp, or encroach upon the inherent powers or province of the judiciary. The doctrine of inherent powers confers upon the courts the power to do all things reasonably necessary for the exercise of their functions as courts, and another branch of government cannot, by denying resources or authority to the courts, prevent them from carrying out their constitutional responsibilities as an independent branch of government. A state supreme court's inherent judicial power is not derived from a legislative grant or specific constitutional provision, but from the very fact that it has been created and charged by the state constitution with certain duties and responsibilities; accordingly, the legislature cannot limit the exercise of inherent judicial power, such being essential to the existence of the court and the orderly and efficient exercise of the administration of justice. However, at least within the federal court system, the exercise of the inherent power of the lower federal courts to impose attorney fees as sanctions can be limited by statutes and

rules, as those courts were created by act of Congress, and a provision of the Antiterrorism and Effective Death Penalty Act barring judicial review of a final order of deportation based on certain criminal offenses does not violate Article III judicial powers, because federal appellate courts have jurisdiction to review final orders of deportation and exclusion against aliens only because Congress has conferred it in the first place.

Congress has the power, for purposes of separation-of-powers analysis under Article III, ß 1 of the Federal Constitution, to enact prospective legislation permitting, or indeed requiring, the United States Supreme Court to make equitable exceptions to an otherwise applicable rule of finality of judgments, just as federal district courts do pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

It has been held that the separation of powers doctrine does not require judicial review of a calculation of the Medicare Part B conversion factor by the Secretary of Health and Human Services, since by enacting a "no review" provision and prohibiting any review of the Secretary's calculation, Congress simply intended to prevent judicial second-guessing of discretionary administrative decisions rather than infringing upon the powers of judicial review and prohibiting review of substantial constitutional issues.

The courts are subject to explicit congressional directives as to choice of law where such directives are constitutional.

It is not within the power of the legislature to change the nature of a judicial function by merely creating another agency to participate in its performance, or generally to invoke or set in motion any public or private law for the purpose of securing to individuals any remedy or relief from alleged wrongs. Neither is it the function of the legislature to determine whether a statute declaring a general policy has been violated in any particular, for that is a judicial function.

282 Controlling the practice of law

When a legislative enactment relating to the admission to the practice of law conflicts with the rules for admission adopted or approved by the judiciary, the legislative enactment must give way. But the inherent right of courts to prescribe qualifications necessary for the practice of law does not mean that the legislature is without any authority in that field. For instance, it has been held by at least one court that the exercise of such authority by the legislature does not mean that the state supreme court, in the exercise of its authority within the premises, may not require qualifications more extensive than those exacted by the legislature.

A statute establishing a ceiling on the compensation that an attorney may receive for representing a medical malpractice claimant does not violate the separation of powers doctrine by unconstitutionally impinging upon the courts' authority to regulate the practice of law, since the statute was designed to declare public policy with respect to attorney fee contracts and does not directly conflict with the courts' authority to regulate the practice of law.

In some states the control of the practice of law is placed in the hands of special commissions. It has been held, in this connection, that a statute creating a board of commissioners of the state bar and conferring upon them, inter alia, the power to suspend or disbar attorneys subject to the court's power of review is within the constitutional powers of the legislature, in view of an affirmative provision of the constitution that powers of a judicial nature may be invested in such persons as the legislature may designate.

283 Interference in litigation

The separation of powers doctrine precludes the legislature from undertaking to readjudicate controversies that have been litigated in the courts and resolved by final judicial judgment. Furthermore, the legislative branch may not violate the separation of powers doctrine by attempting to direct specific results in pending litigation.

Observation: Congress does have the power to amend a statute that Congress believes the United States Supreme Court has misconstrued. Within broad constitutional bounds, Congress may even make such a change retroactive and thereby undo what Congress perceives to be the undesirable past consequences of a misinterpretation of Congress' work product; no such change, however, has the force of law unless the change is implemented through legislation. But many state courts will not enforce retroactive amendments used to circumvent judicial opinions.

The legislative branch cannot take particular cases out of a settled course of judicial proceedings, adjudicate the legal rights of parties, grant a rehearing or appeal after the parties to a final judgment have lost the right to any further hearing, grant new trials, require that a certain deposition be read in the trial of a cause then pending, or control the weight which a trial or appellate court of general jurisdiction should give to the verdict of a jury. However, while Congress cannot tell courts how to decide a particular case, it may make rules that affect classes of cases.

284 Interference in sentencing function; mandatory sentences
Mandatory sentences which cannot be altered or reduced by the exercise of judicial discretion have in some cases been held to entrench upon the inherent powers of the judiciary and as such to violate the separation of powers doctrine, while other courts have held them not to be a violation of the doctrine. For instance, a statute directing a trial court to take a convicted drug defendant's driver's license for forwarding to the Department of Revenue has been held not to violate the constitutional separation of powers doctrine; and a capital rape or capital murder statute which requires imposition of a death sentence or life imprisonment has been deemed not to violate the separation of powers doctrine, since the power to determine appropriate punishments for criminal acts lies in the legislative branch. A statute permitting a sentencing court to depart from a mandatory minimum sentence of life imprisonment for a three-time drug offender only if the prosecution makes a motion for departure on the basis that the defendant provided substantial assistance has been held not to be unconstitutional under the doctrine of separation of powers.

The more common view would seem to be that while the power to define and fix the punishment for crimes is vested in the legislature, the imposition of a sentence within the limits prescribed by the legislature is purely a judicial function.
285 Imposition of judicial functions upon nonjudicial officers or private individuals
The power granted by the state and federal constitutions to the courts to ultimately decide cases presented to them has never been, and can never be, delegated to executive agencies. However, the separation of powers doctrine does not prohibit every conceivable exercise of judicial functions by individuals or groups outside the judiciary. Nonetheless, the judiciary must maintain the power to check the exercise of judicial functions by quasi-judicial tribunals, ensuring that the essential attributes of judicial power, vis- -vis other governmental branches, remain in the courts. Thus, under the principle of separation of powers, it is settled that the legislature may not confer purely judicial functions upon members of the executive branch of government; ministerial officers are incompetent to receive grants of judicial power from the legislature, and their acts in attempting to exercise such powers are necessarily nullities. The rule applies equally to municipal councils.

However, despite the foregoing, just as Congress may encourage parties to settle a dispute out of court or resort to arbitration without impermissible incursions on the separation of powers, Congress may make available a quasi-judicial mechanism through which willing parties may, at their option, elect to resolve their differences. Furthermore, Congress does have the power in some instances to create Article I courts without interfering with the existence and jurisdiction of Article III federal courts.

Observation: The Supreme Court has stated: (1) Article III ß 1 of the Federal Constitution safeguards the role of the judicial branch in the tripartite system of government by barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts, and by thereby preventing the encroachment or aggrandizement of one branch at the expense of the other; (2) to the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject matter jurisdiction beyond the limitations imposed by Article III ß 2; and (3) in determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the judicial branch, the Court will decline to adopt formalistic and unbending rules but will weigh a number of factors, including the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Congress is the constitutionally authorized source of authority over the military system of justice, and where it has not provided any damage remedy for claims by military personnel that their constitutional rights have been violated by superior officers, any action to provide a judicial response by way of such remedy would be plainly inconsistent with the authority of Congress in this field.

Observation: The Supreme Court has recognized that there will always be some difficulty in determining whether or not, in any particular case, a power vested by law otherwise than in a court comes within the category of judicial power delegable exclusively to the courts; and that "bright line" rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III.

In some states, the state constitution expressly provides for the exercise of actual judicial powers and functions by non-judicial officers. Thus, a statute requiring a motion by the district attorney before criminal proceedings against an incompetent defendant can be terminated does not violate the separation of powers doctrine, despite the claim that it deprives a trial court of the ability to dismiss the case and makes the district attorney the final arbiter of a defendant's fate; placing the termination decision with the district attorney is consistent with the traditional powers of the trial court and prosecutor. A state statute which grants calendaring authority to district attorneys does not violate the Due Process Clause of the United States Constitution, unconstitutionally vest an executive officer with judicial powers, or infringe upon the courts' inherent judicial power in violation of the separation of powers. And a juvenile jurisdiction statute provision giving a district attorney preindictment discretion to transfer a case to juvenile court does not violate the separation of powers doctrine, due process, or equal protection.

Ordinarily, the legislature may not delegate judicial functions to private individuals.

286 Interference with judiciary; generally

Generally speaking, the judicial branch of government has exclusive authority to manage its own affairs, although this is not the case in every jurisdiction. And ordinarily, the constitutional grant to the courts of judicial power includes all powers necessary for the complete performance of the judicial function and establishes certain limits beyond which the legislature may not go in specifying how judicial power is to be exercised.

The rule is well settled that the judicial power cannot be taken away by legislative action. Nor may the legislature regulate the judicial discretion or judgment that is vested in the courts. Any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional.

The legislature is not permitted to interfere with the courts in the performance of their duties by declaring the forfeiture or suspension of a judge's salary, or by decreasing the salaries of judges, or by authorizing a litigant or his attorney to disqualify a judge by peremptory challenge. The legislature has no power to direct the judiciary in the interpretation of existing statutes. It cannot by statute interfere with the power vested in the courts by the state constitution to issue writs of prohibition or writs of mandamus to enforce the performance of an official duty. And a state statute providing that a final judgment may be entered against a bond not earlier than 18 months after the date the forfeiture was entered if the offense for which the bond was given is a felony, or nine months after the date the forfeiture was entered, if the offense for which the bond was given was a misdemeanor unduly interferes with the judiciary's effective exercise of its constitutionally assigned powers and, thus, is invalid under the separation of powers doctrine.

The legislature cannot deprive a court of its power and authority to enforce its valid decrees, orders, and judgments by contempt proceedings. But in some states the circumstance that a court has inherent power to punish contempt does not mean that the legislature is powerless to enact statutes regulating contempt procedures or punishment. And Congress can constitutionally curtail the contempt powers of the federal courts.

A statute forbidding the courts to direct a verdict is unconstitutional as invalidly attempting to limit the constitutional powers vested in the judiciary. Furthermore, the exercise of a judicial power may not be conditioned on the approval of either the executive or legislative branches of government. And a statute which requires the judiciary to act or refrain from acting within a specified time is unconstitutional as an unwarranted encroachment by the legislative branch upon the prerogatives and functioning of the judiciary.

But Congress has authority to regulate the practice and procedures of federal courts, and the legislatures in many states may, within proper bounds, prescribe rules of practice and procedure for the exercise of jurisdiction by state courts without violating the separation of powers doctrine, although there is some dissent from this view.

A commonly expressed view is that, under the separation of powers doctrine, the legislature has a limited and appropriate role to act on court rules, and the basic analysis that is applied to determine whether legislative action is appropriate involves the distinction between substance, which is a legitimate subject of legislative action, and procedure, which is under the exclusive jurisdiction of the courts. Under the separation of powers analysis, "substantive laws," which are appropriate matters for legislative action, are those laws which have for their purpose to determine the rights and duties of individuals and to regulate their conduct and relation with the government and other individuals, while "procedural laws," which are within the exclusive jurisdiction of the courts, are those laws which have for their purpose to prescribe the machinery and the methods to be employed in enforcing these positive provisions.

It is held in some jurisdictions that the legislature is empowered to prescribe rules of evidence or methods and burdens of proof, subject to the limitations placed on it by the state and federal constitutions. Thus, a statutory hearsay exception that allows a child to testify that he or she complained of a sexual act to another, and which requires the giving of a pattern instruction, has been held not to be an unconstitutional exercise of judicial power by the legislature.

There is no limitation upon legislative power to restrict the right of appeal, so long as it preserves constitutional rights.

The legislature may set policies controlling the hiring and firing of nonjudicial officers of the judicial branch, and it may establish salaries for a wide range of positions in the judicial branch of the state governments. It may limit or prohibit the award of attorneys' fees and costs against the state, and it may mandate the award of attorneys' fees in other types of cases as well.

A waiver by Congress of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers.

A legislative enactment calling for the use of a three-judge panel rather than a jury during a death penalty hearing does not unconstitutionally encroach on the judicial power or jurisdiction of district courts, since the state constitution does not prohibit the legislature from providing that district judges must act as a collegial body, the legislature has the power to regulate procedure in criminal cases, and the three-judge panel procedure creates no new power.

Congress has constitutional authority to require a judge to disqualify himself or herself from adjudicating certain issues on the ground of a personal financial interest. Therefore, mandating a judge to disclose his or her personal financial interest is a fortiori an objective within the constitutional authority of Congress and such a requirement does not violate the doctrine of separation of powers. Penalties which may be assessed against a judge for noncompliance with the financial disclosure rule under the Ethics in Government Act of 1978, as provided for by Congress, are not in violation of the Constitution as diminishing the compensation of federal judges.

287 Creation of new courts

The legislative branch may create courts, and such is not viewed as interfering with the judicial branch of government; but it cannot ordinarily diminish, enlarge, or interfere with the jurisdiction of a court whose jurisdiction is set out in the constitution itself. Conversely, however, Congress and the state legislatures have full power to declare and define the jurisdiction of various courts insofar as it is not declared and defined by the constitution. Subject to constitutional limitations, the legislature has broad power to confer appellate jurisdiction or to take it away. Also, it may grant concurrent jurisdiction to another court.

288 Generally

The doctrine of the separation of powers of government into executive, legislative, and judicial, each to be exercised by a separate department, operates in a broad manner to confine each department to its own functions, so that none can impose upon the other functions which are not proper to it and none may usurp the powers of the other. A further aspect of this doctrine is that the proper functions of each department must be performed by that department and its powers cannot be passed on to be exercised by others. Thus, the doctrine prohibits a delegation of powers except as permitted by the constitution. Obviously, if the constitution itself permits such delegation, then the delegation is permissible.

The constitutional prohibition against the delegation of legislative power rests on the premise that the legislature must not abdicate its responsibility to resolve fundamental policy making by delegating that function to others or by failing to provide adequate directions for the implementation of its declared policy. It is also premised on the need to protect citizens against discriminatory and arbitrary actions of public officials and to assure that duly authorized, politically accountable officials make fundamental policy decisions. Many state constitutions contain specific provisions prohibiting one governmental branch from delegating any of its authority to another governmental branch, although, as a practical matter, the states are free to allocate the lawmaking function to whatever branch of state government they may choose.

Caution: Despite the foregoing, the doctrine of separation of powers does not prohibit the legislature from delegating its power to execute and administer laws, so long as the delegation carries reasonably clear standards governing its execution and administration. And the incidental exercise of the functions of one department by another is not a violation of the doctrine of the nondelegation of powers.

289 Executive power

While the President's duty, in general, requires his superintendence of his administration and general oversight of various government departments, the President is obviously not required to perform, and is not capable of performing, in person the numerous details incident to such services. In most matters, the President can delegate parts of his power to heads of executive departments, executive officials, and agencies. The President may speak and act through them, and their acts must be regarded as presumptively the acts of the President.

The President, by and with the advice of the Senate, appoints all officers of the United States in accordance with the appointments clause of Art. II, ß 2, cl. 2 of the Federal Constitution; no class or type of officer is excluded because of its special function. Such officers include the appointment of ambassadors and other public ministers and consuls, the justices of the United States Supreme Court, and all other officers of the United States, including cabinet officers, military officers, and military judges, all of whose powers are delegated to them by the President as head of the executive branch.

290 Judicial power; generally

Article III of the Federal Constitution establishes a judicial department with the province and duty to say what the law is in particular cases and controversies. The record of history shows that the Constitution's framers crafted this charter of the judicial department with an expressed understanding that it gives the federal judiciary the power not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy -- that is, with an understanding that a judgment conclusively resolves the case because a judicial power is one to render dispositive judgments. This judicial power must be exercised by the courts and cannot be delegated or surrendered by a court or judge to a nonjudicial body or person, even with the consent of the parties litigant.

291 Nondelegable judicial powers

The judiciary may not surrender to the executive branch its role in enforcing constitutional limits on race-based official action. It is not at liberty to delegate its role with respect to:

.the authority to determine the amount of restitution owed to crime victims;

.the power to commit delinquent children;

.the authority to select a jury;

.the power to determine child custody in a matrimonial action;

.the power to terminate parental rights;

.the power to suspend a driver's license.

And because significant personal rights are implicated by a law which requires that repeat sex offenders register with local authorities and that the community be notified about certain sex offenders, the judiciary has an important nondelegable responsibility to ensure the proper balancing of the rights of registrants with the interests of the community.

The statutory duty imposed upon federal District Courts to fix the terms of a fine must be read as exclusive because the imposition of a sentence, including the terms of probation or supervised release, is a core judicial function. A judge cannot appoint another person to enter final judgments and orders or impose sentences inasmuch as such activities involve a nondelegable core judicial function; however, a judge can utilize referees, court commissioners, and other assistants for various other purposes. A prosecutor's power, under a statute authorizing the death penalty for murder in furtherance of a continuing criminal enterprise, to urge nonstatutory aggravating factors is not an unconstitutional delegation of power to the executive branch. A District Court's giving advice to a probation office regarding imposition of a requirement that the defendant, who pleaded guilty to aiding and abetting the preparation and filing of a false income tax return, had to notify his or her clients of his or her conviction was an impermissible delegation of authority to the probation office, inasmuch as the notification requirement was a substantial occupational restriction and the decision to impose such an occupational restriction was entrusted under the statute to the sentencing court. And a federal court may not delegate to the Bureau of Prisons the responsibility to devise a restitution payment schedule pursuant to the Bureau's inmate financial responsibility program, since allowing the prison staff to determine the payment schedule under the program would be an improper delegation of judicial functions inherent in the grant of restitution.

292 Delegable judicial powers

The judicial branch of government may delegate purely ministerial judicial functions to others, such as where --

-- a court, as a condition of suspending sentence, requires the defendant to report in writing to the department of corrections as directed by them.

-- a court appoints a special master to supervise a particular matter.

-- a court asks a magistrate to prepare a preliminary evaluation.

-- a trial judge permits a circuit clerk to read general voir dire questions to prospective jurors in the judge's presence.

-- a court grants a stipulated withdrawal of a direct appeal of conviction to a clerk of court to file.

An indeterminate sentencing law is not an unconstitutional delegation of judicial power or responsibility; neither is a Minimum Wage Act, an act providing for confirmation of compositions in proceedings for the relief of debtors, a Financial Responsibility Act, or a Corporate Securities Law.

Observation: The term "delegation of judicial power" is sometimes used in reference to the authority of a legislative body to vest judicial power in a nonjudicial body. The constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. Such an inquiry is guided by the principle that practical attention to substance rather than some doctrinaire reliance on formal categories should "inform" the application of Article III.

293 Generally

Since under the doctrine of the separation of the powers of government the lawmaking function is assigned exclusively to the legislature, it is a cardinal principle of representative government (and one not uncommonly stated, in terms, in state constitutional provisions), that except when authorized by the constitution -- as may be the case in reference to municipal corporations -- the legislature cannot delegate its power to make laws to any other authority or body.

An unlawful delegation of legislative authority, violative of the separation of powers doctrine, occurs when there is a delegation of legislative authority to another branch of government without sufficient standards to guide such authority. The legislature may not in any degree abdicate its power; it may not make the effectiveness of a specific act dependent upon the will of another, and certainly it may not delegate to another the power to enact a law, whether in form or effect. Any attempt to abdicate legislative power in any particular field, although valid in form, is unconstitutional and void.

294 Congress as within rule

The general doctrine as to the inalienability of the lawmaking function applies to the Federal Government. Thus, Congress cannot delegate to any other body its strictly legislative powers. But this principle does not mean that only Congress can make a rule of prospective force, since Congress must be permitted to delegate to others at least some of the authority that it could exercise itself, and the nondelegation doctrine also does not prevent Congress from seeking assistance, within proper limits, from its coordinate branches. The basic purpose of the nondelegation doctrine, providing that a legislature cannot delegate its essential legislative power to administrative bodies or officers, is to control unbridled agency discretion.

295 What legislative powers are within rule

The powers which the legislature is prohibited from delegating are those which are strictly, or inherently and exclusively, legislative. Thus, in order that a court may be justified in holding a statute unconstitutional as a delegation of legislative power, the power involved must be one that is purely legislative in nature -- that is, one appertaining exclusively to the legislative department. It is the nature of the power, and not the liability of its use or the manner of its exercise, which determines the validity of its delegation.

Purely legislative power, which can never be delegated, has been described as the authority to make a complete law -- complete as to the time when it shall take effect and as to whom it shall be applicable -- and to determine the expediency of its enactment. Thus, the legislature may not delegate its power to enact, suspend, or repeal laws. The legislative power to create and define criminal offenses cannot be delegated. A legislature's budget-making responsibilities may not be delegated. It cannot delegate its power to appropriate money unless specifically authorized by the federal or state constitutions, although the clause of the Federal Constitution providing that all bills for raising revenue must originate in the United States House of Representatives, while embodying the framers' concern that persons elected directly by the people have initial responsibility over taxation, implies nothing about the scope of Congress' power to delegate discretionary authority under its taxing power once a tax bill has been properly enacted. A legislator cannot appoint another person to cast his or her vote on the floor of the legislature inasmuch as voting power is a core legislative function. And the legislature cannot constitutionally delegate to another body its fundamental decisionmaking authority in the sense that it cannot delegate functions which the state constitution expressly and unqualifiedly vests in the legislature

itself, such as its power to impeach, to propose constitutional amendments, or to enact statutes. Any legislative delegation of power to a legislative or executive agency permitting the agency to declare what the law is violates the separation of powers doctrine. The legislature may not delegate such essential elements of its lawmaking power as its power to declare principles and standards, or general public policy. Finally, it is obvious that the legislature cannot delegate to a subordinate body authority to do something that is beyond its own power.

296 Power to suspend law

The rule is well established that the legislature cannot authorize the suspension of a law by another agency even in cases where it has the power to suspend the law. Indeed, in several of the constitutions of the states, there are inserted provisions that the power of suspending laws shall not be exercised except by the legislature or by its authority. However, in cases involving objections to the vesting of certain powers in the hands of administrative officers, the provision has been held not to have been violated. The enactment of a charter amendment by a home rule city is not a suspension of law within the meaning of this provision. But an agreed order that prohibited the state attorney general from issuing a decision under the Open Records Act regarding professional school employee transcripts until completion of the regular session of the legislature violated the state constitutional prohibition against suspending laws and was held void.

297 Limitations on rule; permissible delegation

The general rule barring delegation of legislative powers is subject to several recognized limitations or exceptions. Thus, the rule does not bar Congress or other legislatures from delegating such of their powers as are not strictly legislative in nature. For instance, the legislature may delegate authority to an administrative agency to carry out legislative policy when the "boundaries" of the delegation are clearly defined, and when the delegation is accompanied by proper standards and guidelines.

Observation: In order to determine whether the delegation of legislative authority is proper, it must be determined whether the legislature delegated the making of fundamental policy decisions, rather than just the implementation of a legislatively determined policy, whether the act provided adequate direction for implementation, either in the form of statutory standards or, if the local authority is to develop standards, sufficient guidance to enable it to do so, and whether the act provided safeguards such that abuses of discretion could be controlled. Under the sliding-scale approach in analyzing the validity of a delegation of authority to an administrative agency, the constitutionality of the delegation is determined on the basis of the scope of power delegated and the specificity of standards to govern its exercise; when the scope increases to immense proportions, the standards must be correspondingly more precise, and these standards may be either explicit or implicit.

The courts recognize that there is a large field in which the legislature may certainly delegate to others powers which the legislature may rightfully exercise itself, so long as the enabling statute provides sufficient safeguards to guide administrative officials. Thus, while the legislature may not delegate legislative power as such to an administrative or executive authority, it does have the power to authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, or for the complete operation and enforcement of a law within designated limitations; however, the standards by which the granted powers are to be administered must be clearly and definitely stated in the authorizing act and may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available. If the policy and purpose of the legislature are clearly expressed, the absence of detailed standards in legislation will not necessarily render it invalid as an unlawful delegation of legislative authority. The standards for the action to carry out the declared legislative policy may be found not only in express provisions of an act, but also in its necessary implications. The fact that a term is subject to interpretation by an administrative agency does not, in and of itself, mean that there has been an unlawful delegation of legislative power. Only in the event of a total abdication of that power, through failure either to render basic policy decisions or to assure that they are implemented as made, will the judiciary intrude on legislative enactments for being an unlawful delegation, and then only to preserve the representative character of the process of reaching legislative decision.

Mere matters of detail within the policy and the legal principles and standards established by the legislature are essentially ministerial rather than legislative. Thus, a statute conferring discretionary authority upon a county clerk, without properly defining the terms under which the discretion is to be exercised, is void as an unlawful delegation of legislative authority; however, the legislature need not establish absolute criteria whereby every detail and circumstance necessary in the enforcement of the law is anticipated.

Necessity fixes the point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules for a delegation of legislative power. The power to make a law and the conferring of authority and discretion as to its execution, which authority is to be exercised under and in pursuance of the law, marks the true distinction be-

tween the powers which the legislature can, and those which it cannot, delegate. In those instances in which the legislature may delegate authority, it may place upon the authority so granted such restrictions and limitations as it chooses. It may also prescribe the manner and circumstances of the exercise of such power.

The case law recognizes that there is a proper delegation of power where the legislature has laid down a complete and definite declaration of policy and established objective standards or guidelines, describing the subject matter or the field wherein the legislation shall apply. This has come to be known as the "intelligible principle" rule. This rule seeks to enforce the understanding that Congress may not delegate its power to make laws, and that it may delegate no more than the authority to make policies and rules that implement its statutes. So long as Congress lays down by legislative act an intelligible principle governing the exercise of delegated power, it has not unlawfully delegated its legislative power; delegation is overbroad only if there is an absence of standards for guidance of an administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed. Thus, the delegation of authority by Congress to the Attorney General to temporarily schedule a controlled substance when doing so was "necessary to avoid an imminent hazard to the public safety" was not an unconstitutional delegation of legislative power, since the statute contained the requisite "intelligible principle" constraining the Attorney General's discretion and, even if more was required, the statute meaningfully constrained the Attorney General by placing multiple specific restrictions on his or her discretion to define criminal conduct. And any delegation of legislative functions to the executive branch by Congress in allowing federal prosecutors to introduce nonstatutory aggravating factors in the penalty phase of a capital case is sufficiently circumscribed by intelligible principles to avoid violating the separation of powers principles.

As specific examples of the general rule just discussed, the Supreme Court has ruled that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that which is applied to other nondelegation challenges, and that while Congress may wisely choose to be more circumspect in delegating its authority under the taxing clause than under other of its enumerated powers, this heightened degree of prudence is not required by the Constitution. The Court has held that Congress acted within its authority under the appointments clause in creating a Special Division with authority to appoint independent counsel to investigate misconduct in the executive branch, provided that such counsel's jurisdiction be related to the factual circumstances giving rise to the Attorney General's request for such an appointment.

Observation: Deference to an agency's interpretation of a statute it administers instructs the courts to accept a reasonable administrative interpretation where Congress has delegated decisional autonomy to the agency. When Congress intentionally leaves gaps and ambiguous terms for the agency to flesh out, separation of powers counsels that this legislative delegation be respected by the judiciary; but it is an entirely different matter to presume a delegation of interstitial rulemaking authority when a claimed ambiguity stems not from the use of a word with several plausible interpretations, nor from the statute's lack of specificity regarding mundane procedural issues, but from nothing more than the failure of Congress to explicitly proscribe an unusual procedure which is at odds with the result Congress was trying to reach.

In the application of the rule permitting delegation of legislative powers under appropriate circumstances, various federal and state legislative acts have been sustained by the courts as permissible (or as not unlawful) delegations of legislative power. Thus, the Supreme Court and other federal courts have sustained quite broad grants of power by Congress to:

.the President;

.the Supreme Court;

.the Secretary of Agriculture;

.the Attorney General;

.the Secretary of the Treasury;

.the Secretary of Transportation;

.the Secretary of Labor;

.the Secretary of the Interior;

.the Secretary of Health and Human Services;

.the Interstate Commerce Commission;

.the Federal Trade Commission;

.the Federal Communications Commission;

.the United States Sentencing Commission;

.the Pension Benefit Guaranty Corporation;

.the National Bituminous Coal Commission; and

.the Federal Home Loan Bank.

The Supreme Court has also stated that no absolute rule bars Congress' delegation of authority to define criminal punishments, and that the exercise of any delegated authority to define crimes may be sufficient in certain circumstances to supply the notice to defendants which the Constitution requires. And it has held that the statutory scheme inherent in the Omnibus Crime Control and Safe Streets Act of 1968 was not an invalid delegation of powers as would allow a prosecutor unfettered discretion in selecting which of two penalties to apply, nor did it impermissibly delegate to the executive branch Congress' responsibility to fix criminal penalties.

Practice guide: The question of unlawful delegation of state legislative power is determined in terms of a state's constitution, and the Federal Constitution plays no part therein.

A legislature's incorporation in a statute, by reference, of the "most current" or "most recent" version of a standard which has been promulgated by a private organization has been held to be an unconstitutional delegation of legislative power to the extent that the statute is read as incorporating any revisions of such standard promulgated after the enactment of the statute; in keeping with the rule that a statute should, where possible, be construed so as to avoid a construction that would render it of doubtful constitutionality, courts taking this view will construe such a statute as incorporating the version of the standard existing at the time of the statute's enactment, rather than any subsequent revision of the standard. Other authority, however, holds that such construction is unnecessary. Under this view, where the incorporation by reference in a statute of a standard promulgated by a private organization is permissible -- a determination informed by such considerations as the eminence of the organization promulgating the standard, the practical necessity of its adoption, and its significance outside the context of the statute at issue -- the fact that the standard is periodically revised does not transform an otherwise constitutional and nondelegatory statutory provision into an unconstitutional delegation of legislative power.

298 Power to determine facts

The preliminary ascertainment of facts as a basis for the enactment of legislation is not of itself a legislative function, but is simply ancillary to legislation. Thus, the duty of correlating information and making recommendations is the kind of subsidiary activity which the legislature may perform through its own members, or which it may delegate to others to perform. Intelligent legislation on the complicated problems of modern society is impossible in the absence of accurate information on the part of the legislators, and any reasonable method for securing such information is proper. As an example, a state statute authorizing the Public Service Commission to determine the need for a natural gas pipeline and setting forth the criteria to be applied provides sufficient guidelines to overcome any claim of an unconstitutional delegation of power.

The Federal Constitution as a continuously operative charter of government does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.

299 Subdelegation or redelegation

Somewhat analogous to the rule which permits an agent, when expressly authorized by the principal, to subdelegate his or her authority, there is authority holding, or at least recognizing, that a permissible delegation of legislative power sometimes may be subdelegated or redelegated. Without an express congressional authorization for subdelegation, however, a court must look to the purpose of the statute to set its parameters, although subdelegation generally is permitted where it is not inconsistent with the statute.

In some states, a redelegation of legislative power is not allowed.

300 By states to Congress or federal agency

The principle is firmly established that a state legislature has no power to delegate any of its legislative powers to the Congress of the United States, or to a federal agency or officer. Thus, it is generally held that the adoption, by or under authority of a state statute, of prospective federal legislation, or federal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power. There is, however, authority to the contrary, holding that no unconstitutional delegation of authority inheres in a state statute providing that prospective federal legislation shall control.

It has been held that a state legislature does not invalidly delegate its legislative authority by adopting a law or rule of Congress, if such law is already in existence or operative.

301 By Congress to state legislatures

Congress cannot by delegation enlarge the powers of the states, although it may provide for state regulation by divesting articles of their interstate character at an earlier time than would otherwise be the case. Many omissions or commissions of Congress have been unsuccessfully attacked on this ground. Thus, as respects a subject matter over which Congress and the states may exercise a concurrent power, but from the exercise of which Congress may exclude the states, Congress may, without unlawfully delegating its power, withhold the exercise of its paramount power and leave the states free to act. And undue delegation of federal legislative power has been held not to be involved in state action in aid of, or supplementary to, federal legislation.

In line with the foregoing rule, the Interstate Horseracing Act, which governs interstate wagering on horseracing, does not violate separation of power principles or the nondelegation doctrine, even if the act does effect a "delegation" of sorts of legislative power to the states. A federal statute, which makes it unlawful to deal in any fish or wildlife taken in violation of any state law or regulation, does not unconstitutionally delegate federal legislative authority to the states or their agencies, as the statute's enforcement provisions involve no true delegation of Congress' power. Congress also does not improperly delegate authority to the states to define the elements of a federal crime, in penalizing the possession of a firearm by a person convicted of a crime punishable by imprisonment for a term exceeding one year, even though the states might vary in classifying criminal behavior as felonious, as Congress defined the elements of the federal offense by prohibiting firearm possession by anyone that any state determined to be a felon. One Federal Court of Appeals has even said that the separation of powers principle, and, a fortiori, the nondelegation doctrine simply are not implicated by Congress' "delegation" of power to the states, because such delegation in fact furthers the core constitutional value of federalism. Although a power of eminent domain purely federal in its nature may not be delegated by Congress to a state, the ascertainment of the amount of compensation to be paid for property appropriated in federal proceedings may be reckoned in accordance with the law of the state in which the property happens to be situated without an invalid delegation of congressional authority.

The United States Supreme Court has held that Congress may adopt, for application to federal territory located within state boundaries, future criminal legislation of the state in which the territory is located. And Congress may adopt later state legislation as respects actions for injuries occurring within the territory under its jurisdiction within the boundaries of the state.

No impermissible delegation by Congress of its own power to a state agency occurs where Congress accepts a state's action as a condition upon which its exercise of power is to become effective. And no unconstitutional delegation by Congress of its power to the states is involved in an act of Congress which declares that the continued regulation and taxation by the several states of a certain business is in the public interest and that such business shall be subject to the laws of the several states which relate to its regulation or taxation.

302 To electorate or people at large

The legislature may not escape its duties and responsibilities by delegating its legislative powers to the people at large. Thus, a state legislature may not delegate its power by a referendum to a majority of the voters of a state voting at an election. The rule is different, however, where the constitution permits such reference. The Supreme Court has held that a referendum authorized by a state constitution or legislative body on a question within the scope of the legislative power cannot be characterized as a delegation of power, since, as a matter of constitutional assumption, all power derives from the people who can delegate it to representative instruments which they create; in establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.

303 To nongovernmental persons or groups; generally

In general, the legislative branch of government may not delegate legislative powers or functions to nongovernmental persons or groups, to special public or private commissions, or to private corporations or a group of private corporations.

304 Individuals

In principle, the legislative branch cannot delegate its legislative powers to individuals. For instance, it cannot delegate to private individuals in industries to be regulated the power to establish codes of fair competition. However, the legislature's grant to litigants of the option to select the forum for prosecution of their cases is not a grant of judicial, legislative, or executive power, and hence its exercise by a prosecutor does not violate the separation of powers doctrine; but the legislature's power to prescribe when appellate jurisdiction shall be invoked cannot be subject to an open-ended delegation to a private party.

State statutes which require that an automobile manufacturer, in order to add dealerships to the market areas of its existing franchisees, must obtain the approval of the state's new motor vehicle board only if an existing franchisee files a protest with the board, are not invalid as constituting an impermissible delegation of state power to private citizens, even though the statutes require the board to delay franchise establishments and relocations only when protested by existing franchisees who have unfettered discretion whether or not to protest; an otherwise valid regulation is not rendered invalid simply because those whom the regulation is designed to safeguard may waive its protection. But attempted delegation of powers to private persons may be repugnant to the Due Process Clause where it permits an arbitrary exercise of powers by such individuals and therefore violates the constitutional requirement of reasonableness.

The rule is frequently encountered in zoning controversies. Some zoning ordinances permit, in specified zones, the construction of particular kinds of buildings, or the use of land or buildings for particular purposes, where the consent of a stipulated percentage of the adjoining or local property owners is obtained, and deny the right to make such construction or use without such consent. The validity of such provisions has been sustained as against the contention that they operate as an improper delegation of legislative powers to private persons. In order to withstand attack as an impermissible legislative delegation of authority, zoning ordinances that establish criteria for the acceptance of conditional use must specify the reasons why such use may be denied. A zoning ordinance prohibiting a conditional use permit unless the proposed use does not adversely affect the value of adjacent properties gives sufficient guidance to a zoning board and conditional use applicant as to what facts must be presented to gain approval, and therefore is not an unconstitutional delegation of legislative authority to board. But a statute permitting 40 percent of the neighboring property owners to file a written protest following adoption of a zoning ordinance, without providing guidelines or standards for testing the adopted ordinance or legislative bypass to allow a review of the protest, has been held to be an unconstitutional delegation of legislative power.

305 Nongovernmental associations, groups, or corporations

Congress and the state legislatures generally cannot delegate their legislative powers to nongovernmental associations, groups, or corporation; however, the application of this general rule presents a confusing picture. The Supreme Court has held that Congress cannot, for example, give a group of coal producers the power to make law and enforce it upon others. However, Congress can pass a law and prescribe the conditions of its application, including in those conditions the requirement of a favorable vote upon referendum by the group intimately affected. Also, Congress may validly delegate to an Indian reservation's tribal council Congress' constitutional authority to control the sale of alcoholic beverages by non-Indians on their fee-patented land located within the boundaries of the Indian reservation. The Interstate Horseracing Act, which governs interstate wagering on horseracing, does not unconstitutionally delegate legislative power to private parties, even though, under the act, approval of the host horsemen's association is required for off-track wagering. But a Workers' Compensation Act provision requiring the selection of Workers Compensation Board members by a committee consisting of representatives chosen by a labor union and a business association has been held an unconstitutional delegation of legislative power to private organizations.

The fact that a state legislature allowed a state high school activities commission to make rules for interscholastic athletic competitions did not constitute an unconstitutional delegation of legislative authority by default. And an agreement under which a university would participate in managing a public school system was held not to be an unconstitutional delegation of the school committee's powers to a private entity, where the university was a public agent authorized by the state to perform under the agreement. No unlawful delegation of legislative power to a nongovernmental agency is involved in a statutory scheme which permits a private professional association to recommend to a state agency a member of the profession who is competent to render the professional service which the statutory scheme calls for.

Statutes requiring applicants for professional licenses to be graduates of accredited colleges recognized by stated professional associations have been held not to constitute unlawful delegations of legislative power. A statute authorizing a "person" operating or constructing an electric generating plant to condemn rights-of-way to run power lines, maintain dams, flow backwater, or carry on other activities necessary for constructing and operating such plant is not an unconstitutional delegation of legislative authority, despite a contention that there are no standards to guide utility companies in determining whether the property to be condemned is "necessary." Giving the statute a reasonable construction to carry out its intent and purpose, it delegates only that authority to condemn property reasonably necessary to establish and operate an electric generating plant and only that property necessary for such public purpose. A provision in a state Electrical Contractors Licensing Act requiring the performance of electrical construction in accordance with the standards of the National Electrical Code has been held not to be an unconstitutional delegation of legislative authority to a private organization to set standards. And legislation is not objectionable as conflicting with the rule of separation of governmental powers where the power which it "delegates" to a private agency is a power which has always been exercisable by private persons.

When a legislature incorporates the standards of a private organization into a statutory scheme, the incorporation is not always considered to be an unlawful delegation of legislative power. On this point, however, there is authority to the effect that a statute so providing is unconstitutional, for the reason that it is said to give to a private corporation the option to create an offense and that, moreover, it is an invalid delegation of the authority of the legislature.

306 Power to appoint or nominate to public office

The United States Supreme Court has held that all officers of the United States are to be appointed in accordance with the appointments clause of Art. II ß 2, cl. 2 of the Federal Constitution, and that no class or type of officer is excluded from this rule because of its special function. The application of the same rule by various state supreme courts has not produced such a clear rule. The constitutional division or separation of governmental powers has been held by some courts not to have been violated by statutes giving to private persons or organizations the power of appointment or nomination to public office. Such holdings have been based upon various grounds. Thus, in some jurisdictions having constitutional provisions to the effect that officers whose election or appointment was not provided for in the constitution were to be chosen in such manner as was prescribed by law, it has been held that the legislature could designate private persons or groups to make such appointments. Other courts have determined the validity of legislation granting to private organizations the power to appoint to public office, on the basis of whether or not there was a rational and substantial relationship between the organizations and the laws to be administered. One state supreme court upheld a statute delegating to private organizations the right to appoint to public office, on the ground that it was not a delegation by the legislature of its lawmaking power, but merely of the power which it could have exercised itself in an administrative capacity.

Several courts have sustained legislative delegation to private organizations of the power to nominate to public boards because of the former's fitness to select the board members. However, other courts have held that a legislature's grant to private persons or organizations of the right to appoint to public office was a violation of the constitutional division of the sovereign power among the three branches of government. And at least one court has held that a legislature may not limit the governor's power of appointment by restricting his or her choice to a list of nominations made by private organizations.

The question is frequently encountered in situations where a state law requires membership in a medical association as a condition of being appointed to a public office. For example, a statute delegating authority to a state medical association of the power to appoint a board of medical examiners was held constitutional, where sufficient guidelines were established by the legislature for the medical association's appointments. But another state statute dictating membership in a private medical association as a prerequisite to membership on a State Board of Medical Examiners was held void because it unconstitutionally delegated the power of appointment to a private organization. And a statutory provision requiring a state governor to appoint members of a private chiropractic association to a state board of examiners was held invalid because it constituted an unconstitutional delegation of the appointment power to a private organization where the association's ability to control its membership was absolute.

307 Power regarding prices, hours, or wages

Statutes which lodge the power to initiate administrative legislation on prices, wages, or hours exclusively in private groups and limit the power of the appropriate administrative agency to either approve or disapprove such legislation, in some instances even without authorizing them to modify or revise it, have been held invalid as an improper delegation of legislative power in a number of cases. Certainly, a direct delegation to private groups, individuals, or corporations

would be invalid. On the other hand, where a statute authorizes the appropriate administrative agency to enact, upon its own initiative, legislation on prices, wages, and hours, under adequate standards fixed by the statute, it is not, merely because it also authorizes private groups to initiate such legislation, subject to the objection that it improperly delegates legislative power to private groups or to private corporations. And a statute empowering an administrative agency to enact legislation on such subjects, under proper standards fixed by the statute, is not, merely because by its terms such administrative legislation is to take effect only upon the consent of certain private groups, subject to the objection that it constitutes an improper delegation of legislative power to such groups. And no improper delegation of legislative power to a private group exists where such group has power only to make nonbinding recommendations to an administrative agency. Also, statutes permitting manufacturers of trademarked articles to contract with buyers for maintenance of a fixed resale price, violation of which contract is made actionable by any person damaged, have been upheld against the objection that such statutes unconstitutionally delegated legislative power. And nonsigner provisions in fair trade laws have been upheld as against the claim that they involve a delegation of legislative power to private groups contrary to constitutional guaranties, although there is contrary authority in this regard.

308 To political subdivisions

It is a well-settled rule, supported with practical unanimity by the authorities, that the general doctrine prohibiting the delegation of legislative authority has no application to the vesting in political subdivisions of powers to govern matters which are local in scope. For a great variety of purposes and governmental functions, the legislature may delegate a part of its power over local subjects to municipal corporations, counties, and other public bodies within the legislative classification of departments. Thus, for instance, legislative authorization allowing a county commission to grant a municipal annexation through a minor boundary adjustment is a proper delegation of legislative authority. In addition to the most frequent exercise of this power, in the case of municipalities, this principle has been employed to sustain a delegation of powers ordinarily exercisable only by the legislature to such subdivisions as towns, park commissions, school districts, and counties or county boards.

In some instances, however, the provisions of state constitutions either forbid the delegation of power to certain boards or permit the exercise of such powers only by specified subdivisions. For example, a legislature in one state was held unable to constitutionally delegate to counties the authority to determine the number of magistrates they wished to fund. And a statute which created a library district and permitted the appointed trustees of the district to set the town tax rate was held invalid because it unconstitutionally delegated the power to tax to the library district's trustees.

309 Municipal corporations

The constitutional maxim which prohibits the legislature from delegating its power to any other body or authority is not violated by vesting municipal corporations with certain powers of legislation as to matters of purely local concern of which the parties immediately interested are supposed to be better judges than the legislature. Ordinances passed under such delegated powers, if legally enacted, have the force of laws passed by the legislature. The legislative power granted or delegated by the state to a municipality is not lodged in the common council, commission, or other local legislative body, or in any other officers or agents of the city, but in the city as a body politic. It follows that there is no constitutional inhibition against the exercise of such power by the voters of a municipality passing on initiative or referendum measures.

Notwithstanding the broad application of the principle that legislative power may be delegated, it has its limitations. Hence, it is held that delegation cannot be made of an exclusive power over a matter the control of which has been lawfully vested in, and not withdrawn from, another branch of the government. If a statute establishing standards to be used by a local governing body in determining whether, for instance, to grant a liquor license are unconstitutionally vague, the statute is also an unconstitutional delegation of legislative power. Also, while the delegation of legislative power over a limited section of the state to a municipal corporation is constitutional, the class of powers so delegated must be such as to have reference to matters which form appropriate subjects of municipal regulation. Furthermore, in delegating power to a municipality to exercise discretion in a certain matter, the legislature must prescribe fixed or specific standards for making the determinations which involve the use of such discretion.

The legislature cannot delegate its power to make laws to local governing bodies without imposing adequate standards to guide the discretion of those bodies. Constitutional provisions may also directly affect the extent of permissible delegation. Thus, where the constitution forbids irrevocable grants of special privileges or immunities, the legislature cannot make such a grant indirectly by giving power to a city to make it.

310 To executive

It is generally recognized that the legislature of a state cannot transfer or delegate to the governor any strictly legislative powers, such as the power to create offices. And it is generally agreed that any legislative action vesting executive branch agencies with the authority to determine the constitutionality of a statute would violate the separation of powers doctrine.

The general principle that Congress cannot delegate its strictly legislative powers to the President is universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. However, on countless occasions, the legislative branch does delegate to the executive branch the authority to enforce the laws made by Congress by issuing administrative rules and regulations. Such executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require it. That kind of executive action is always subject to check by the terms of the legislation that authorized it, and if that authority is exceeded, it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely. In other words, the fundamental precept of the delegation doctrine under separation-of-powers jurisprudence is that the lawmaking function belongs to Congress and may not be conveyed to another branch or entity, but that principle does not mean that only Congress can make a rule of prospective force, since Congress must be permitted to delegate to others at least some authority that it could exercise itself.

The separation-of-powers principles does not preclude Congress from delegating its constitutional authority to make rules for governing the military to the President to define aggravating factors that permit the imposition of the statutory penalty of death in military capital cases, with regulations providing the narrowing of the death-eligible class required by the Eighth Amendment. Congress exercises the power of precedence over, not the exclusion of, executive authority, and a special limit on this congressional power would be contrary to the highest deference given to Congress in ordering military affairs and contrary to the respect owed to the President as Commander-in-Chief. Furthermore, no absolute rule bars Congress' delegation of authority to define criminal punishments, and the exercise of delegated authority to define crimes may be sufficient in certain circumstances to supply notice to defendants which the Constitution requires. The Supreme Court has also ruled that Congress, under some circumstances, may delegate its authority to define criminal punishments to the executive branch. Additionally, a statute providing prosecutorial discretion to proceed against a juvenile over the age of 14 charged with a violent felony in either juvenile court or as an adult in District Court does not violate the separation of powers doctrine under a state constitution.

Observation: Legislative delegations of power to an executive body historically require a clear delineation of legislative policy and substantive standards to guide the agency in the implementation of policy; but precise substantive guidelines or standards are not required in the legislation if adequate procedural safeguards are provided which advance the legislature's purpose and preclude arbitrary, capricious, or illegal conduct by the agency. The character of the administrative agency is also important in testing a statute for adequacy of standards to determine whether the statute involves an unlawful delegation of legislative authority in violation of the separation of powers doctrine; the sufficiency of the standards varies according to the complexity of areas sought to be regulated. The holder of regulatory powers delegated from Congress is entitled to fill in gaps and resolve ambiguities in the statute.

The rule regarding the impermissibility of any delegation of legislative power to the executive branch is clearly subject to some qualification. The Supreme Court in one case approved of an implied delegation to the President of a power which the Federal Constitution vests exclusively in Congress. The Supreme Court has also ruled that a statute delegating authority to the Attorney General to schedule a controlled substance on a temporary basis does not violate the principle of separation of powers by concentrating too much power in the hands of the Attorney General, who also wields the power to prosecute crimes, the Court saying that the separation of powers principle focuses on the distribution of powers among the three co-equal branches of government, and does not speak to the manner in which Congress parcels out its authority within the executive branch. The Court has held that a statute permitting the Secretary of Transportation to establish a system of user fees to cover the costs of administering certain federal pipeline safety programs was not unconstitutional, and another federal court has held that various other federal officials could establish rules and regulations when they have been delegated authority to do so by Congress.

Caution: It is generally conceded that the delegation by Congress to an executive agency of power to issue regulations interpreting a statute extends only to the proper extent of resolving ambiguities that may inhere in the statute.

The legislature may confer upon executive officers and administrative agencies discretion as to the execution of a law, to be exercised under and in pursuance of the law, and once it has delegated such discretion, the legislature may not unilaterally control the execution of rulemaking authority after its delegation of rulemaking power, regardless of whether it does so by suspension, revocation, or prior approval of administrative rules. However, it must be noted that administrative agencies owe their existence to the legislature, which retains plenary power over them; thus, if the legislature concludes that it has given away too much power, it may by statute take it back or may in the future enact more specific delegations.

Congress may properly delegate a mere executive duty to effectuate its legislative policy. Moreover, there have been cases holding that the powers delegated to the President, or a member of the executive department, were appropriate, or that the standards established by the legislature were sufficient to meet any attack of unconstitutional delegation of legislative power. However, other cases have held certain delegations of power to the executive branch to be inappropriate.

311 Executive power as to international or external affairs of United States

In internal affairs Congress must retain the lawmaking power given to it in the enumerated grants of the Federal Constitution, and cannot abdicate its functions to the executive department. Quite a different principle applies, however, to matters which are solely external and in which the power of the United States is exercised as a sovereign nation in the field of international relations. The Supreme Court has pointed out that the nuances of foreign policy are more the province of the executive branch and Congress than of the Supreme Court. The Court has also stated that it is important to bear in mind that because of the changeable and explosive nature of contemporary international relations, and the fact that the executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress -- in giving the executive authority over matters of foreign affairs -- must of necessity paint with a brush broader than it customarily wields in domestic areas. But, added the Supreme Court, this does not mean that simply because a statute deals with foreign relations, it can grant the executive a totally unrestricted freedom of choice to act in this area.

312 To judiciary

One important application of the principle as to the separation of governmental powers and their allotment to the three departments of government is the rule prohibiting any vesting of legislature power in the judiciary. The legislative branch cannot delegate or confer legislative power on the courts or impose legislative duties upon them, because such duties are not judicial in nature. An act of the legislature delegating legislative powers to courts is unconstitutional. Thus, a court cannot be empowered to engage in zoning or made to issue licenses. And the provisions of a motor vehicle franchise act which charge a court with the responsibility of investigating and weighing various statutory and nonstatutory factors in order to determine whether a dealership should be established or relocated, and what the public interest and welfare is in each case involving a proposed dealership, impermissibly delegate to the judiciary matters which are for legislative or administrative determination, and therefore violate the doctrine of separation of powers.

Consistent with the separation of powers, however, Congress may delegate to the judicial branch nonadjudicatory functions that do not trench upon the prerogatives of another branch and that are appropriate to the central mission of the judiciary. Thus, delegation to a court of the power to ascertain a state of facts under which a statute is applicable is not an unlawful delegation of legislative power to the judiciary. And the legislature may provide for the appointment of court assistants and the fixing of their compensation by the executive department or by the courts themselves, and in so doing it is not delegating legislative power to another, but in reality is authorizing only an executive or ministerial act. Furthermore, the deliberate delegation to the judiciary of a legislative power that is in keeping with its judicial responsibilities or a duty that is judicial or quasi-judicial in nature is not subject to the constitutional stricture.

313 Generally

The police power is an indispensable and essential attribute of sovereignty. It is a general principle of constitutional law that the state cannot surrender, abdicate, or abridge its police power. An act is within the state's police power if it is reasonably related to a legitimate governmental interest. In any case, it is clear that the power is a necessary attribute of every civilized government.

The police power is as old as the civilized governments which exercise it. The states existed before the Constitution of the United States, and they possessed the police power before the adoption of that organic document. The states require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power. Moreover, the Constitution supposes the pre-existence of the police power, and must be construed with reference to that fact.

Practice guide: Because a law adopted in the exercise of the police power is presumed constitutional, its challenger bears the burden of affirmatively and clearly establishing its invalidity.

314 Source

"Police power" is often said to be a general term used to express the particular right of a government which is inherent in every sovereignty. Thus, it is an inherent power of the states, possessed by every one of them as sovereign.

From what has been said, it follows that the police power is not a grant derived from or under any written constitution. The term is not found in the Declaration of Independence, the Federal Constitution, or even in most state constitutions. The police power is a grant from the people to their governmental agents, and the right of the legislature to exercise the police power is not only not referable to any single provision of the Constitution, but inheres in, and springs from, the nature of our institutions; hence the limitations upon it are those which spring from the same source, as well as those which are expressly stated in the Constitution.

315 Definition, generally; difficulty of definition

The term "police power" is difficult to define precisely, because it is extensive, elastic, and constantly evolving to meet new and increasing demands for its exercise for the benefit of society and to promote the general welfare. It embraces the state's power to preserve and to promote the general welfare and it is concerned with whatever affects the peace, security, safety, morals, health, and general welfare of the community; thus, it cannot be circumscribed within narrow limits, nor can it be confined to precedents resting alone on conditions of the past. The term has been characterized as hazy and ambiguous, and the line separating the legitimate use of the police power from the illegitimate is often incapable of precise delimitation, as it varies from circumstance to circumstance.

The difficulty encountered in defining "police power" has been the subject of frequent judicial comment. In fact, the police power is by its nature incapable of any satisfactory or exact definition or limitation. The United States Supreme Court has said that a definition of the police power is essentially the product of legislative determinations "addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition." Except for the substitution of the familiar standard of "reasonableness," the Supreme Court has generally refrained from announcing any specific criteria.

316 Particular judicially stated definitions

While has been recognized that it is very difficult and practically impossible to give an exact definition of the police power, many attempts have nonetheless been made. There is no consensus in favor of any of them, but these definitions are of considerable value as indicating the breadth and scope of this power. Thus, some courts have said that the police power in effect sums up the whole power of government, and that all other powers are only incidental and ancillary to the execution of the police power; it is that full, final power involved in the administration of law as the means to the attainment of practical justice.[n72] The police power is said to be the power to govern; it is the inherent, reserved power of the state to subject individual rights to reasonable regulation in the interests of the general welfare. The state has the sovereign right to protect its citizens and has wide discretion when it exercises its police power for this purpose. The existence of the police power imposes on the state the duty to take adequate steps to protect the lives of its residents.

One court has defined the "police power" as the power of the state, inherent in every sovereignty, to enact laws, within constitutional limits, to promote the welfare of its citizens. Another court has said that the police power of the state is that which enables states to pass regulations for the health, safety, and general welfare of the people. Still another has said that the police power is the inherent power of the government to promote the general welfare, and covers all matters having a reasonable relation to the protection of the public health, safety, or welfare. Some cases define it as "the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

There is considerable authority which speaks of the police power as the power inherent in the state to prescribe, within the limits of the state and federal constitutions, reasonable regulations necessary to preserve the public order, health, safety, and morals. And many cases which do not use this language state definitions of essentially similar import.

317 Generally; importance of power

The police power is perhaps the most important of governmental powers. It has been called a principal pillar of government, and has been described as the most essential, the most insistent, and always one of the least limitable of the powers of government. Moreover, the very existence of government, as well as the security of the social order, the life

and health of citizens, the enjoyment of private and social life, and the beneficial use of property are dependent upon this power.

318 Distinctions between police and other governmental powers

The boundary line which divides the police power of the state from the other functions of government is often difficult to discern. Although its exercise and the exercise of the power of eminent domain have much in common, the police and eminent domain powers are also essentially distinct. Thus, under the police power, many restrictions may be imposed without compensation being given, whereas under the power of eminent domain compensation is required. A further and more important distinction lies in the fact that in eminent domain, property or a right in property is taken from the owner and transferred to a public agency to be enjoyed by it as its own, whereas under the police power, although it may and often does take property in the constitutional sense so that it must be paid for, such taking is not accomplished by a transfer of ownership, but by destroying the property or impairing its value. Private property is taken by eminent domain for a public use, while the police power regulates its use and enjoyment, or, if it takes or damages it, it is not a taking or damaging for the public use, but to conserve the safety, morals, health, and general welfare of the public. The essence of the police power, as differentiated from the power of eminent domain, is that deprivation of individual rights and property cannot prevent its operation, once it is shown that its exercise is proper and that the method of its operation is reasonably within the meaning of due process of law.

There is no doubt that a real distinction exists between the police power and the power to levy taxes; they are both distinct, coexistent powers in the state. Broadly speaking, the distinction is that the taxing power is exercised for the purpose of raising revenue and is subject to certain designated constitutional limitations, while the police power is exercised for the promotion of the public welfare by means of the regulation of dangerous or potentially dangerous businesses, occupations, or activities, and is not subject to constitutional restrictions applicable to the taxing power. It may consequently be said that if the primary purpose of a statute or ordinance exacting an imposition of some kind is to raise revenue, it represents an exercise of the taxing power, while if the primary purpose of such an enactment is the regulation of some particular occupation, calling, or activity, it is an exercise of the police power, even if it incidentally produces revenue.

The war power of Congress is not unlike what in the states is called the police power, but it is the police power raised to the highest degree. Both are well-known functions of government, and both are rules of necessity, impliedly or expressly existing in every form of government, the one to preserve sovereignty, and the other to preserve the health and morals of the community. The state's power to effect extraordinary regulations in emergencies, being limited to the police power itself, is less extensive than the war power of the Federal Government.

319 Flexibility

The police power of the state, never having been exactly defined or circumscribed by fixed limits, is considered as being capable of development and modification within constitutional limits, so that the powers of governmental control may be adequate to meet changing social, economic, and political conditions. The power is a continuing one, is very broad and comprehensive, and is liberally viewed and applied. Its flexibility is a necessary consequence of the fact that the changing conditions of society may make it imperative for the state to exercise additional powers, and the welfare of society may demand that the state should assume such powers. A court is obliged to give governments wide latitude in creating social and economic legislation; without the presence of some circumstances to induce heightened judicial scrutiny, a court is entitled to presume that a municipal ordinance is valid and is not required to delve into the motivations of board members who proposed and drafted ordinance.

In exercising the police power, the legislature may proceed step by step, condemning that which it deems to be the greatest menace to the health and welfare of the people, and leaving further regulation and prohibition for future consideration. Thus, when enacting legislation, Congress need not deal with every problem at once, and must be afforded a degree of leeway in tailoring the means to the ends.

Over time, the tendency is to extend rather than to restrict the police power. What was at one time regarded as an improper exercise of the police power may subsequently, because of changed living conditions, be recognized as a legitimate exercise of that power. Similarly, practices harmless in and of themselves may, from changed circumstances, become the source of evil or may have evil tendencies justifying restrictive legislation. And a police regulation, although valid when made, may become arbitrary and confiscatory in operation by reason of later events.

320 Inalienability

It is a fundamental principle of constitutional law that in matters relating to the police power, each successive legislature is of equal authority. A legislative body cannot part with its right to exercise such power; it inherently has authority to use the power again and again, as often as the public interest may require. The state cannot barter or bargain away the right to use the police power, or by any contract divest itself of the power to provide for acknowledged objects of legislation falling within the domain of the police power. Accordingly, the legislature cannot surrender, abdicate, or limit such powers, either by affirmative action or by inaction, or abridge them by any grant, contract, or delegation whatsoever, and a statute which embodies a legislative attempt to surrender or limit the state's police powers would be unconstitutional and void. However, the inalienability of the police power does not preclude its delegation to municipalities and other governmental subdivisions, as those entities are part of the total government of the state.

Observation: When a legislative body retains the police power, articulated standards and guidelines to limit the exercise of such power are unnecessary; police powers which are delegated, however, must include minimum standards and guidelines for their application.

Pursuant to the foregoing principles, the exercise of the police power cannot be limited by contract, and it is immaterial on what consideration any such contract rests, since in all cases it is beyond the authority of a state or its municipalities to abrogate this power so necessary to the public safety. And a municipality cannot, by contract, foreclose the exercise of the police power, unless clearly authorized to do so by the supreme legislative power.

In some states it is specifically provided in the state constitutions that the exercise of the police power may never be abridged.

The corollary that the discretion of the legislature with respect to exercise of the police power cannot be parted with any more than the power itself is as firmly established as the general rule. Thus, the legislative authority cannot redelegate to anyone the ultimate right to determine when, to what extent, and under what circumstances the police power may properly be exercised in any given case.

321 Sic utere tuo ut alienum non laedas

The police power to a large extent rests on the maxim "sic utere tuo ut alienum non laedas" (so use your own that you do not injure that of another). The police power is the function of the government by which this maxim is enforced, and the whole idea behind the law of nuisance, as expressed in the maxim "Sic utere tuo ut alienum non laedas," is that every person has the right to the free use of his or her property so long as the rights of another are not injured. This principle does not conflict with the express constitutional right that all persons have of acquiring, possessing, and protecting property.

322 Salus populi suprema lex est

Another principle involved in the police power is expressed by the well-known maxim "salus populi suprema lex est" (the welfare of the people is the highest law). "Salus populi est suprema lex" is the maxim most popularly applied to the police power. It stands for the proposition that legislation in response to the demands of strong or preponderant opinion is necessary to the public welfare and is a proper exercise of the police power. This maxim is the foundation principle of all civil government and for ages it has been a ruling principle of jurisprudence. It is the polestar of police power legislation. All private rights enjoyed by individuals as members of the public are subject to the paramount right of the state to modify them to conserve the public welfare under this maxim.

323 Law of necessity

The police power has been described as the law of necessity and as being coextensive with the necessities of the case and the safeguards of public interest. In a general way the police power extends to all the great public needs, and may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. And governments may undertake to do more than the Constitution requires. Thus, for example, imposition of a requirement that all automobile drivers have mandatory insurance coverage is within the state's police power. This general doctrine furnishes the key to what is included within the boundaries of police power -- not that a police regulation, to be legitimate, must be an absolute essential to the public welfare, but that the exigency to be met must so concern such welfare as reasonably to suggest a necessity for the legislative remedy. It is not essential that a present necessity should exist before the legislature moves under the police power; it may act to prevent apprehended dangers as well as to control those already existing.

While an emergency does not create power, increase a granted power, or remove or diminish the restrictions imposed upon a power granted or reserved, an emergency may furnish the occasion for the exercise of police measures. Thus, a limit in time in order to tide over a passing trouble may justify a law that could not be upheld as a permanent change. It

must be borne in mind, however, that an emergency does not automatically lift all constitutional restraints, and that a law that depends upon the existence of an emergency to uphold it may cease to operate if the emergency ceases, even though it was valid when passed.

Appellate courts, when called upon to determine the validity of police regulations, frequently incline toward acquiescing in the opinion of local tribunals and bodies, because the latter are familiar with local conditions and are in a better position to judge the necessity of such enactments.

324 States and political subdivisions

The police power under the American constitutional system has been left to the states, and is normally vested in and exercised by the legislative branch, or by political subdivisions of the state to which the legislature has made a proper delegation of its authority in this respect. The states, vested as they are with the general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power.

The police power has always belonged to the states, and was not surrendered by them to the general government or directly restricted by the Constitution of the United States. Each state has the power to regulate the relative rights and duties of all persons, individuals, and corporations within its jurisdiction for the public convenience and the public good.

The provisions of the Federal Constitution elevating federal treaties and statutes over state legislation apply fully to state police regulations, with the result that the police power of a state cannot be held to embrace a subject confided exclusively to Congress by the United States Constitution, nor can it defeat or impair a statute passed by Congress in pursuance of the powers granted to it.

325 Through legislature

The police power which belongs to the states is generally vested in and exercised by the legislative branch of the state government. The power of the legislature is extremely broad, and is subject only to the requirements of reasonableness and appropriateness of the means, and to the limitations of the federal and state constitutions. While a legislature may not, under the guise of regulating in the public interest, impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory, whether the legislation is in the public interest is generally a question for legislative determination.

326 Through other governmental branches or departments

Under proper circumstances, the police power may be exercised by the executive department. The attorney general is one of the executive officers of the state who may exercise the police power under proper circumstances. In the exercise of the police power of the state, the legislature may delegate to him or her any such legal, administrative, or executive duties as it deems best and which are not otherwise delegated by the state constitution.

Under proper circumstances, the courts also may make orders involving exercise of the police power. While the police power is generally considered an exclusive power of the legislature, it may, under some circumstances, be exercised by the courts. For example, it has been held that under the police power, a state supreme court, as an incident to its inherent power to integrate the bar, may impose a membership fee for the support of bar integration activities. Generally, however, a court will rarely, if ever, originally exercise a police power, its function being rather to review the exercise of police power by the legislature or an agency to which it has delegated the power.

327 Through private persons, corporations, or public agencies

Since generally the legislature may not delegate its legislative powers to private individuals, associations, or corporations, the legislature is without authority to delegate the exercise of the police powers to a private corporation or private citizen to be used for private purposes as distinguished from a public purpose, particularly where there is no state supervision. But there is some authority to the effect that a governmental unit does not abdicate its police power by contracting with private persons to perform police power functions. And a statute providing for incorporation of fire districts in counties of a specified population upon the petition of 100 taxpaying electors has been held not to constitute a delegation to private citizens of the power to create a political subdivision.

Wherever a legislature has the right to accomplish a certain result and that result is best attained by means of a corporation, it has the right to create such a corporation and to endow it with the powers necessary to effect the desired and lawful purpose. Thus, a state may use a private corporation and confer upon it necessary powers to carry into effect police regulations. It may also create a governmental agency for the enforcement of its police powers.

328 Federal Government

Congress has no general power to enact police regulations operative within the territorial limits of a state, and it cannot take this power from the states or attempt any supervision over the regulations of the states established under this power. The exercise of the police power by a state is beyond interference by the Federal Government, except by virtue of some authority derived from the Constitution of the United States.

Federal deference in matters within the states' police power reflects more than a policy of comity; in fact, it represents a constitutionally derived recognition of the essential character of state government within the federal system. All that the Federal Government can do ordinarily is to see that the states do not, in attempting to exercise the police power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has vested in the national government, or deprive a citizen of rights guaranteed to him or her by the Federal Constitution.

Observation: The statement that the Federal Government exercises no police powers, although technically correct, is erroneous to the extent that such an assumption involves the conception of a total absence of powers in the nature of police powers in the Federal Government, because it runs counter to the repeated exercise by the national government of legislative powers within the sphere of general powers granted to it by the Constitution which are typical of what would, in the case of a state, be designated as "police powers." Once it is assumed that the general subject of a controversy is properly within the scope of the enumerated powers granted to the Federal Government, that government has broad powers to prescribe police regulations concerning such subjects just as a state government would have concerning a subject within its reserved powers.

Such powers are analogous to the police power of the states. In other words, the limitation in the United States Constitution (in the Tenth Amendment) of the powers of the Federal Government deprives that government of the right to exercise police powers only to the extent that the exercise of such powers may not be connected or associated with one of the powers expressly or by necessary implication granted to that government. Thus, the more accurate way of putting it is not that the United States has no police power, but that the United States possesses whatever police power is appropriate to the exercise of any attribute of sovereignty specifically granted it by the Constitution.

Under the power of Congress to regulate interstate and foreign commerce, and under other powers such as the war power, the power over mails, and the power over federal lands, regulatory federal measures have been adopted and held valid which are directly analogous to the police power exercised by state legislatures. Thus, a federal power corresponding to the police power of the states arises under the general welfare provision of the Federal Constitution. Moreover, since, under Art. IV, ß 3, cl. 2 of the Federal Constitution, Congress has the power to make all needful rules and regulations respecting the territory or other property belonging to the United States, this power of the United States, "analogous to the police power of the state," is clearly applicable where the lands of the United States are concerned. And although Congress may not authorize the pretrial civil commitment of a criminal suspect simply to protect the general welfare of the community at large, it may impose such commitment when it is necessary and proper to the exercise of some specific federal authority. Although owners of unpatented mining claims hold fully recognized possessory interests in their claims, the United States, as owner of the underlying fee title to the public domain, maintains broad powers over the terms and conditions upon which public lands can be used and acquired. Claimants thus must take their mineral interests with the knowledge that the Federal Government retains substantial regulatory power over these interests, that it has substantial power to regulate for the public good the conditions under which the business is carried out, and that it may redistribute the benefits and burdens of economic life.

329 Generally

While the police power is the least limitable of governmental powers, it is not, despite certain language to be found in some decisions, a totally unlimited power. The legislature may not, under the guise of regulating in the public interest, impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory. Moreover, the police power is, by its nature, exercisable only restrictively, restriction being implicit in the power itself.

The judicial branch of the government is the final arbiter of the limitations applicable to the police power; but the notion that courts may freely assume the role of arbiters of public policy is very much exaggerated, for the courts should especially avoid assuming such a role in the face of a statutory scheme which bespeaks its own policy considerations. The limitations on the police power have never been drawn with exactness by the courts, and its boundary line cannot be determined by any general formula in advance.

330 Territorial limitations

The police power of a state generally may not be projected beyond its territorial boundaries. Thus, for example, a state cannot, under the police power, regulate or proscribe the activities conducted in another state by an organization, locat-

ed in that other state, which provides services relating to obtaining legal abortions in that other state. However, a state consumer regulation is not invalid because it protects consumers outside the state, as well as those within the state. And state workers' compensation acts, which are enacted under the police power, are frequently given extraterritorial operation so as to cover injuries occurring outside the state. Moreover, the Federal Government, exercising what is essentially, if not technically, equivalent to the police power of the states, has been held to have the authority to punish treason committed abroad, the usual presumption against extraterritorial application of the criminal law not being applicable to the offense of treason. The Federal Fair Labor Standards Act, by its own terms, is applicable to certain territories and areas outside the United States, although generally it is expressly made inapplicable to employees whose services are performed in a foreign country. It is possible for a legislature to grant a municipality authority to regulate a condition outside its territorial limits, as a police measure, with such authority being limited to prohibiting that which the municipality reasonably finds would endanger the public health, safety, or welfare of the inhabitants of the municipality. The Supreme Court of the United States has held that a state's "police jurisdiction" statutes -- which subject persons residing within three miles of a city's corporate limits to the city's police, sanitary, and business-licensing powers, and to the criminal jurisdiction of the city's courts, but which do not extend the right to vote in municipal elections to persons residing within the police jurisdiction area -- are not invalid as violative of the equal protection or due process provisions of the Fourteenth Amendment.

331 Generally

The fixed rule and basic standard by which the validity of all exercises of the police power is tested is that the police power of the state extends only to such measures as are reasonable and that all police regulations must be reasonable under all the circumstances. Indeed, the only limitation upon the exercise of the police power is that such exercise must be reasonable.

Too much significance cannot be given to the word "reasonable" in considering the scope of the police power in a constitutional sense, for the test used to determine the constitutionality of the means employed by the legislature is to inquire whether the restrictions it imposes on rights secured to individuals by the Bill of Rights are unreasonable, and not whether it imposes any restrictions on such rights. In other words, the requirement of reasonableness is a manifestation of the due process requirement, and an unreasonable exercise of the police power results in deprivation of property without due process. The validity of a police regulation therefore primarily depends on whether, under all the existing circumstances, the regulation is reasonable or arbitrary and whether it is really designed to accomplish a purpose properly falling within the scope of the police power.

For a statute to be a proper exercise of the police power, it must also be reasonable in its operation upon the person whom it affects, must not be for the annoyance of a particular class, and must not be unduly oppressive, discriminatory, capricious, whimsical, or arbitrary.

332 Determination of reasonableness; tests

It is difficult, if not impossible, to lay down an all-embracing test of reasonableness by which the great variety of situations impelling legislative regulation can be measured. What constitutes a reasonable interference with private property by the exercise of the police power is a matter for which there is no certain test, but one which rests in human judgment, natural justice, and common sense. Whether a restriction is reasonable may depend on many factors, no single factor being ordinarily decisive. At the same time, some generalizations which are controlling in all situations may be drawn from the cases.

Legislation must be reasonable in the sense that it must be based on reason, as distinct from being wholly arbitrary or capricious. A regulation which ostensibly seeks the protection of the public safety, but which factually runs counter to the common experience of humanity, is unreasonable. The police power, in furtherance of public safety, health, and welfare, is coextensive with the public need, and the reasonableness of its exercise must be measured largely by the same standard.

"Reasonableness," as the term is used in this connection, is not synonymous with "expediency;" matters of expediency are wholly for legislative cognizance, while reasonableness is subject to judicial inquiry. The reasonableness of the exercise of the police power of a state must be considered in the light of current economic conditions. Whether a regulation adopted in the exercise of the police power is reasonable depends upon the character or nature of the condition to be remedied. Similarly, all of the surrounding facts and circumstances are to be taken into consideration. In determining the reasonableness of a police regulation, the courts may look to see what has been done in similar cases. The "fairly debatable" test will be looked to by the courts in determining the reasonableness of a regulation; if a court is convinced

that the object of a regulation is one which reasonable persons could find fairly debatable as to reasonableness, the regulation will be upheld.

The test of the reasonableness which is required if a statute based upon the police power is to avoid violation of the constitution has also been held to be whether, in its attempted regulation, it makes efficient constitutional guaranties and conserves rights or is destructive of inherent rights. The regulation must tend to some ulterior good to which the destruction of liberty is merely incidental, although it is not necessarily unreasonable because it results in inconvenience or loss to an individual. Hardship, economic or otherwise, is no argument against the constitutional validity of an otherwise valid exercise of the state's police power.

Observation: The reasonableness of a regulation asserted to constitute an exercise of the police power is to be determined as of the time the validity of the regulation is drawn in question. Even though a police enactment may have been, or may have seemed to be, valid when made, later events or later discovered facts may show it to be arbitrary and confiscatory, and it may then be struck down by judicial action, even though previously judicially reviewed and held to be valid.

333 Generally

It is a general rule that in order for a police measure to be reasonable, the means adopted must be reasonably necessary and appropriate for the accomplishment of the legitimate objects falling within the scope of the power. To sustain legislative interference by virtue of the police power, it is necessary that the act should have some reasonable relation to such objects, or, for more specific examples, to the public welfare or public health.

334 Test of appropriateness; relationship between purpose and means

The police power is very broad and comprehensive, and in its exercise the conduct of an individual and the use of property may be regulated so as to interfere to some extent with the freedom of the one and the enjoyment of the other. However, for the exercise of such police power to be valid, there must be a reasonable connection between it and the promotion of the health, comfort, and safety and welfare of society. If a police measure is to be upheld as embodying a means appropriate to the accomplishment of a particular purpose for which the police power may be exercised, the measure must be rational, and must tend toward the accomplishment or promotion of such purpose in a degree that is perceptible and clear, or must tend to prevent some offense or manifest evil, although the validity of a statute enacted under the police power does not depend upon the absolute assurance that the purpose designed can in fact or probably be fully accomplished as contemplated, or upon the certainty that it will best serve the purpose intended, it being sufficient if the statute may be reasonably expected to correct the evil proscribed. In other words, to determine the validity of a statute passed pursuant to the police power, a court considers whether the challenged statute tends to promote the health, peace, morals, education, good order, safety, and welfare of the people and whether the requirements imposed by the challenged statute bear a reasonable and substantial relation to accomplishing the purpose of the enactment. The effect and professed purpose must substantially agree and coincide. The mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not in itself bring that statute within the police power of a state, for there must always be an obvious and real connection between the actual provisions of a police regulation and its avowed purpose, and the regulation adopted must be reasonably adapted or designed to accomplish the end sought to be attained.

A statute or ordinance which has no real, substantial, or rational relation to the public safety, health, morals, or general welfare is a palpable invasion of rights secured by the fundamental law and cannot be sustained as a legitimate exercise of the police power. The exercise of the power must have a substantial basis, and cannot be made a mere pretext for legislation that does not fall within it. If particular means are to comport with the requirement of appropriateness, they should not go beyond the necessities of the case and should not be unduly oppressive or more drastic than is reasonable to accomplish the end for which the law was adopted.

335 Generally; power and discretion of legislature

The discretion of the legislature in the exercise of the police power is very large, both in determining what the interests of the public require and what measures and means are reasonably necessary for the protection of such interests. In fact, the courts often state that, within constitutional limits, the legislature is the sole judge as to what laws should be enacted for the protection and welfare of the people, and as to when and how the police power of the state is to be exercised. Thus, it is for the legislature to determine when conditions exist calling for the exercise of the police power to meet existing public evils; and when exerting its authority to suppress what it is free to regard as such an evil, it may adopt such measures having reasonable relations to that end as it may deem necessary in order to make its acts effective. It follows that so long as an act of the legislature does not infringe upon the inherent rights of life, liberty, and property, either directly or through some limitation upon the means of living or some material right essential to the enjoyment of life,

the legislative determination as to the necessity for police regulation and the method to be employed is conclusive upon the courts.[n71] On the other hand, a mere assertion by the legislature that a statute relates to the public health, safety, or welfare does not of itself bring such statute within the police power of a state, nor does a declaration in a statute as to its purposes determine whether the means provided are reasonably designed to accomplish those purposes, and a court may properly inquire into that subject.

Governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of the legislation in question. Hence, in the exercise of such power, the legislature cannot, by its mere fiat, make that reasonable which is indisputably unreasonable. Legislative bodies cannot, under the guise of police regulations protecting the public welfare, arbitrarily pass laws which have no relation to that object.

336 Duty and right of courts; in general

In accordance with the general rule that where the validity of legislation is properly raised, it is the duty of the judiciary to determine its constitutionality, when police statutes are challenged as an invasion of rights and liberties guaranteed by the fundamental law, it becomes the duty of the courts to determine whether the exercise of power is really necessary for the public good.

The propriety of the exercise of the police power is a judicial question, but a court must accord considerable deference to the judgment of the legislature, inasmuch as a decision as to what constitutes a public purpose is first and foremost a legislative decision. So long as an act of the legislature does not infringe upon the inherent rights of life, liberty, and property, either directly or through some limitation upon the means of living or some material right essential to the enjoyment of life, the legislative determination as to the necessity for police regulation and the method to be employed is conclusive upon the courts. The courts cannot undertake to decide whether the means adopted by the legislature are the only means or even the best means possible to attain the end sought, for such course would vest the exercise of the police power of the state in the judicial department. The methods, regulations, and restrictions to be imposed to attain results consistent with the public welfare are purely of legislative cognizance, and the determination of the legislature is final, except when so arbitrary as to be violative of the constitutional rights of the citizen. In other words, so long as the police power of the state is not arbitrarily or unreasonably exercised, is rational, and is not violative of any constitutional provision, the courts will not interfere.

Observation: A federal court will not ordinarily interfere in the exercise of the police power of a state government, or to question the wisdom and effectiveness of its police methods, but in matters impinging on the First Amendment, undifferentiated fears cannot be permitted to excuse the suppression of First Amendment rights.

A statute is not to be condemned as an improper exercise of the police power if any rational ground exists for its enactment. It is the duty of the courts to sustain police measures (as much as measures of any other kind) unless they are clearly, plainly, and palpably in violation of the constitution.

Whether an exercise of the police power bears a real and substantial relation to the public health, safety, morals, or general welfare of the public, and whether it is unreasonable or arbitrary, are questions which are committed in the first instance to the judgment and discretion of the legislative body, and unless the decisions of such body on those questions appear to be clearly erroneous, the courts will not invalidate them. Moreover, the basic rule that the courts look only to the constitutionality of legislation, and not to its propriety, justice, wisdom, desirability, expediency, or policy, has consistently been applied in cases involving police regulations. Similarly, the motive of the legislative body in passing a police regulation is irrelevant, and is not a proper subject of judicial inquiry.

Debatable questions as to the reasonableness of the exercise of a state's police power are not for the courts but for the legislature. But because the police power is subordinate to the organic law, legislative determination is conclusive upon the courts only within constitutional limits, which leaves open for judicial inquiry all questions as to the actual effect of attempted police measures upon constitutional rights.

337 Applicable presumptions

Upon a judicial inquiry into the validity of police legislation, the legislative findings are entitled to great weight and the legislative remedy will not be struck down unless its invalidity is clearly established. The legislative body is presumed to have taken into consideration the circumstances and conditions under which the subject matter of a police regulation exists, and the courts in passing on whether or not a regulation is reasonable may look to the same circumstances and conditions so far as they are matters of judicial knowledge or may be admitted or shown by clear evidence in the record.

Also, the presumption is always in favor of the validity of a legislative body's action in the exercise of the police power, and every intendment is to be drawn in favor of the lawfulness of the exercise of legislative power to make regulations to promote the public welfare.

338 What questions are for courts to decide

A determination by the legislature as to what is a proper exercise of the police power is not final and conclusive, but is subject to the supervision of the courts. Thus, whether legislation is actually within the police power, or, stating the proposition more correctly, whether the power has been exercised within the proper limitations, whether the facts of a particular case warrant the assertion of the power, whether a measure is reasonable or arbitrary, whether a particular measure is designed to further some governmental function or private gain, what are subjects of the lawful exercise of the police power, and whether an act bears any reasonable and substantial relation to the public purpose sought to be accomplished are, ultimately, all judicial questions.

339 Constitutional standards to be applied by courts

The factors considered in determining the constitutionality of police measures are no different from those which have relevance to the determination of the constitutionality of other types of legislation. But there are certain principles -- or, at least, certain expressions of principles -- which appear to be of special significance in relation to exercises of the police power. Thus, in order to sustain legislation under the police power, the courts must be able to see that its operation tends in some degree to prevent some offense or evil or to preserve public health, morals, safety, and welfare, and that if a statute discloses no such purpose, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge and thereby give effect to the constitution. Only in cases where the legislature exceeds its powers will the courts interfere or set up their judgment against that of the legislature. Thus, it is not the function of the United States Supreme Court, under the authority of the Fourteenth Amendment to the Federal Constitution, to supervise the legislation of the states in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character which have no reasonable relation to the execution of lawful purposes. And in accordance with the general rule that legislation cannot be invalidated by the courts merely because it may conflict with notions of natural rights or social justice, police regulations may not be declared void merely because they are deemed to be contrary to natural justice and equity, but only because they violate some constitutional right. In fact, a statute is not to be invalidated by the judicial arm of government if the challenged statute does not contravene some significant constitutional or inherent rights of individuals, the classification on which it is based is reasonable, it is within the scope of the police powers of the state, and it is appropriately related to the proper purpose of such police power.

340 Generally

One of the most difficult problems in constitutional law is that of determining the constitutional limitations upon the exercise of the police power. The state's police power does not justify an interference with constitutional rights that is entirely out of proportion to any benefit redounding to the public, and, generally speaking, the "unconstitutional conditions doctrine" holds that the government may not grant a benefit conditioned on the beneficiary's surrender of a constitutional right, even though the government may withhold the benefit completely. The extent to which constitutional limitations upon governmental power in general operate to inhibit the exercise of the police power is a most difficult matter, involving intricate questions and highly abstract ideas. The line of demarcation between the valid exercise of police power and constitutional guarantees is not always well defined, and courts must accord to the legislature a wide range of power to classify and delineate in declaring the public policy of the state. Consonant with their reluctance to formulate any ironclad definition of the police power, or announce any rigid boundaries to its exercise, the courts have dealt with the issue of police power as affected by constitutional requirements on a case-by-case basis, preferring to rule that a particular police measure was or was not invalid as a matter of constitutional law, rather than that the principles of constitutional law barred enactment of police measures of a particular type. It can be noted, however, that inasmuch as the exercise of the police power interferes with individual rights, the use of such power must bear a substantial relationship to a legitimate government interest, and must not be unreasonable or arbitrary.

341 Applicability of constitutional provisions

A state constitution presupposes the existence of the police power and is to be construed with reference to that fact. Notwithstanding that the rule is not always stated with as much precision as it might be, the police power is exercisable only within the limits which, under the state and federal constitutions, are applicable to all governmental action. Thus, a state may not exercise its police power in such a way as to violate a positive constitutional mandate.

A constitutional right cannot be abridged by legislation under the guise of police regulation, and the police power is not a universal solvent by which all constitutional guarantees and limitations can be loosened and set aside, regardless of

their clear and plain meaning, nor is it a substitute for those guarantees. By virtue of the supremacy clause of the Federal Constitution, state action under its police power must give way when in conflict with the Federal Constitution.

If a state statute violates the Constitution, the reserved powers of the state will not validate it. At the same time, the courts may not lightly set aside, as an invasion of rights guaranteed by the constitution, statutes, ordinances, and regulations enacted to further the common welfare. In this connection, the United States Supreme Court has stated that it does not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. And while there was a time when the Supreme Court used the Due Process Clause to strike down laws which it thought were unreasonable -- that is, unwise or incompatible with some particular economic or social philosophy -- it has long since abandoned the use of that clause for such purpose.

342 Incidental effect upon constitutional rights

A police regulation, obviously intended as such, and not operating unreasonably beyond the occasions of its enactment, is not rendered invalid by the fact that it may affect incidentally the exercise of some right guaranteed by the constitution. The right to preserve the public health, to protect the public morals, and to provide for the public safety may interfere to some extent with both liberty and property, but statutes to effectuate these ends have been repeatedly sustained by the courts. Thus, it has been said that although almost every exercise of the police power will necessarily infringe upon constitutionally protected rights, an exercise of the police power having such an effect will be valid if it bears a real and substantial relation to the public health, safety, morals, or general welfare of the public, and if it is not unreasonable or arbitrary.

343 Private or personal rights and liberties

Although it is often difficult to draw the line between the rights of the citizen to pursue and enjoy liberty and to seek and obtain happiness, on the one side, and the right of the state to enact laws in the general interests of all the people, on the other side, it is firmly established that the police power may not unreasonably invade private rights or unreasonably interfere with personal liberty -- that is to say, the legislature has no power, under the guise of police regulations, arbitrarily to invade the personal rights and liberty of the individual citizen by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect, and thus violate those rights which are guaranteed under either the Federal or state constitution. Laws imposing restraints on personal liberty in the absence of some public necessity therefor cannot be sustained, and a regulation, to be valid, must tend to some ulterior good to which the destruction or curtailment of rights is merely incidental. However, in accordance with the general principles that all rights are subject to a proper exercise of the police power, and that in a democracy personal rights do not rise above the power of the public to regulate in the interest of the common welfare, it is equally well settled that the possession and enjoyment by the individual of his or her right of liberty are subject to such reasonable regulations and restraints as may be imposed by the state in the exercise of the police power (so long as the burden is not an arbitrary or unreasonable one), in order to preserve the health, safety, morals, and welfare of the community.

344 Police measures affecting innocent acts

The legislature, in enacting a police regulation, may include within the purview of the statute acts innocent in themselves where the inclusion of such acts is necessary in order to make the regulation effective. On the other hand, it has also been said that the legislature, in the exercise of its police power, may not validly make it a crime to do something which is innocent in itself merely because it is sometimes done improperly, attended by improper motives, or done as part of an illegal scheme. An act which has no tendency to affect or endanger the public in connection with health, safety, morals, or general welfare, and which is entirely innocent in character, is not within the police power. And a person may not be deprived of his or her liberty for the doing of an act which is not, and cannot be made, unlawful.

345 Freedom to contract

The rule that liberty of contract is constitutionally protected, and that governmental power to limit this liberty must rest on some reasonable basis and cannot be arbitrarily exercised, applies with full force to police regulations which impose restrictions upon such freedom. Hence, a statute limiting the right of a citizen to contract with reference to his or her property must tend to promote the public good in some way; otherwise, it is an unwarranted interference therewith.

At the same time, the right of contract is subject to certain limitations which the state may lawfully impose in the exercise of its police power for the promotion of the health, safety, morals, and welfare of those subject to its jurisdiction. Liberty of contract is not necessarily violated by restrictions imposed under the police power, even though conditions that arise from the operation of the restriction render ineffective related contracts which in themselves may be lawful. If a contract is one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from doing so by the Fourteenth Amendment.

346 Constitutional right to own and use property; generally

The right to acquire and own property, and to deal with it and use it as the owner chooses so long as the use harms nobody, has been termed a natural right to which the police power of the state is subordinate. Although the government has considerable latitude in regulating property rights in ways that may adversely affect a property owner, the owner nevertheless has the constitutional right to make any use of it he or she desires so long as the use does not endanger or threaten the safety, health, and comfort or general welfare of the public. Its enjoyment cannot be interfered with or limited arbitrarily. The police power does not include the power to arbitrarily invade property rights. The lawmaking authorities may not, under the guise of police power, impose restrictions which are unnecessary and unreasonable upon the use of private property. Police regulation of the use or enjoyment of property rights can only be justified by the presence of a public interest, and such rights may be limited only to the extent necessary to subserve the public interest.

347 Appropriate regulation of right to use property

The fact that rights of property are protected by constitutional guarantees does not mean that the use thereof cannot be regulated under the police power in behalf of the general welfare, since restricting property rights guaranteed by the state constitution is permissible if the restrictions are reasonably necessary to secure the health, safety, good order, and general welfare. No rule in constitutional law is better settled than the principle that all property is held subject to the right of the state reasonably to regulate its use under the police power, and that the possession and enjoyment of all rights are subject thereto, in order to secure the general safety, public welfare, public convenience, and general prosperity, and the peace, good order, and morals of the community.

Observation: The traditional analysis of reasonableness and necessity focuses on such issues as whether an emergency exists justifying the impairment, whether the law was enacted to protect a basic societal interest, rather than as a favor to a group, whether the law is narrowly tailored to the emergency at hand, whether the imposed conditions are reasonable, and whether the law is limited to the duration of the emergency.

The state, in the exercise of its police power, may frustrate even expectations that rise to the level of a "property interest," subject to constitutional protection. Considerations of financial loss or of so-called "vested rights" in private property are insufficient to outweigh the necessity for legitimate exercise of the police power. Accordingly, rights of property are subject to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in it by the Constitution, may think necessary and expedient.

The enforcement of legislation that adversely affects property rights is valid when the public interest being served clearly outweighs the impairment. This rule is based upon the concept that all property within the jurisdiction of a state, however unqualified may be the title of the owner, is held on the implied condition or obligation that its use shall not be injurious to the equal right of others to the use and benefit of their own property.

348 Zoning regulations as affecting rights in realty; generally

In accordance with the general rule that all property rights are held subject to reasonable police regulations so that the rights of the general public may be protected, the owner of real estate may be restricted in the use and management of it by zoning rules and regulations in such a way as best to conserve the public health and safety, and police legislation may provide that a particular use of land shall be unlawful or a nuisance even though such use had previously been lawful. The zoning power is not unlimited, however; the power to zone derives from the police power of the state, and zoning ordinances must therefore bear a reasonable relation to goals properly pursued by the state through its police power.

State statutes requiring oil and gas developers to pay the surface owners for actual damages caused by drilling operations even if the mineral estates were separated from the surface estates before enactment of the statutes are not invalid exercises of the police power in that such statutes benefit the surface owners, where they also benefit the public interest by advancing the purpose of protecting the agricultural uses of the land.

Observation: As in other applications of the police power, the difficulty concerning zoning regulations relating to real property is in attempting to draw the line between constitutional regulation and unconstitutional invasion. The tendency is to uphold such legislation as valid regulation, since under the modern view the police power extends to attracting a desirable citizenship to a particular locality of a municipality and assuring its permanency, to fostering pride in, and attachment to, the city, to promoting happiness and contentment, to stabilizing the use and value of property, and to promoting the public tranquillity and good order of the city. Present-day conceptions of the extent of the public interest, particularly in relation to the public welfare, are very broad, and so many restrictions on the uses to which real property may be put, many limitations on the types of structures which may be erected on premises in certain localities, and many groupings in definite localities of the enterprises which may be carried on real property are now sustained as valid

exercises of the police power, which a few years ago were regarded as invading the constitutional rights of the property owner.

349 Aesthetic considerations as justifying regulations

At one time it was generally a well-settled rule, accepted even by courts which had partially questioned its soundness in relation to modern social conditions, that the state could not limit or restrict the use which a person could make of his or her property under the guise of the police power, where the exercise of such power would be warranted solely on aesthetic considerations. However, the United States Supreme Court more recently has held that a state may legitimately exercise its police powers to advance aesthetic values by prohibiting the posting of all signs, including signs posted by political candidates, on public property, and that municipalities have a weighty, essentially aesthetic (and protectable) interest in proscribing intrusive and unpleasant formats for expression. Courts have also upheld the power of municipalities and other governing bodies, under carefully prescribed circumstances, to limit or ban the use of outdoor billboards essentially for aesthetic reasons, saying that it is within the constitutional power of a city to attempt to improve its appearance, and that municipalities have a weighty, essentially aesthetic interest in proscribing intrusive and unpleasant formats for expression. Determining where particular business uses shall be allowed to expand in a community is an appropriate exercise of the police power, and preserving the aesthetic values and economic viability of a community's downtown business core can be a proper zoning purpose.

Aesthetic considerations have a definite relation to the public welfare. The United States Supreme Court has said that the values represented by the public welfare are spiritual as well as physical, aesthetic as well as monetary; that it is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled; and that nothing in the Due Process Clause bars exercise of the police power on the basis of aesthetic considerations. Consequently, whether such a regulation should be voided should depend upon whether the restriction is an arbitrary and irrational method of achieving an attractive, efficiently functioning, prosperous community -- and not upon whether the objectives are primarily aesthetic.

350 Particular modes of interference

Property rights are held subject to a reasonable exercise of the police power in behalf of the public interest; thus, the legislature may pass laws regulating the acquisition, enjoyment, and disposition of property, even though in some respects these may operate as a restraint on individual freedom or the use of property.

Regulation under the police power extends to the property both of private individuals and of corporations. Moreover, property of every kind is held subject to police regulation, including contracts and rights in things intangible as well as tangible.

A prohibition simply upon the use of property in a manner injurious to the health, morals, or safety of the community cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes or restrict his right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the interests of the community.

351 Imposition of burdens and expenses

Laws are not rendered unconstitutional by reason of their imposing burdens on persons or property, since the right to impose such burdens is an essential quality or incident of the police power. Hence, property owners may be required to assume all kinds of restraints and burdens in order to secure the general comfort and safeguard the public health. Moreover, the mere fact of pecuniary injury does not warrant the overthrow of police legislation. Thus, a proper police measure may operate to depreciate the value of property. Similarly, expenses may be imposed upon property owners. [n13] However, the value of the property and the amount of the expense required in order to comply with police regulations should be taken into consideration in estimating the reasonableness of a statute enacted under the police power, since an unreasonable imposition of expenses may be unconstitutional.

352 Fourteenth Amendment, generally

In accordance with the settled principle that no part of the Federal Constitution was intended to hamper a valid exercise of state police regulation, it is established that the Fourteenth Amendment was not designed to interfere with, and does not interfere with, curtail, impair, limit, restrain, destroy, bar, or take from the states the right duly and properly to exercise the police power. Furthermore, this amendment does not limit the subjects upon which the police power of a state may be exerted.

Although the Fourteenth Amendment does not interfere with a proper exercise of the police power, in accordance with the general principle that the power must be so exercised as not to invade unreasonably the rights guaranteed by the Federal Constitution, it is established that every state power, including the police power, is limited by the inhibition of the Fourteenth Amendment. Moreover, the ultimate test of the propriety of police regulations must be found in the Fourteenth Amendment, since it operates to limit the field of police power to the extent of preventing the enforcement of statutes in denial of the rights that the amendment protects.

353 Due process

It has been said that the balance between police powers and due process is more or less in a state of unstable equilibrium, changing with sociological and economic development. Under the state's police power, the legislature has discretion to prescribe the penalties for defined offenses; however, that power is tempered by constitutional limitations which prohibit the deprivation of liberty without due process of law.

On the one hand, the general rule is firmly settled that the provisions of the Fourteenth Amendment prohibiting any state from depriving any person of life, liberty, or property without due process of law do not operate as a limitation upon the police power of the state to pass and enforce such laws as will inure to the health, morals, and general welfare of the people. The state is not deprived of the power to enact regulations reasonable in character, and a statute or ordinance which is a valid exercise of the police power does not violate the due process clauses of the state and federal constitutions. Indeed, regulation under a proper exercise of the police power is due process, even though a property in whole or in part is taken or destroyed or burdens and expenses of various types are imposed. Thus, such provisions are not to be construed so as to put the state and federal governments into a straitjacket and prevent them from adapting life to the continuous change in social and economic conditions. The imposition of strict liability, in the exercise of the police power of a state, does not of itself contravene the due process clauses of the federal or state constitutions. Similarly, the enactment of a comparative negligence statute of general application does not violate due process. Even the fact that police regulations may prevent the enjoyment of rights in property without providing compensation does not necessarily render them violative of the due process clause. On the other hand, the United States Supreme Court has pointed out that the Fourteenth Amendment requires that governmental regulation shall be accomplished by methods consistent with due process, and that the Due Process Clause is a limitation upon an improper exercise of the police power by the states in that it prevents an arbitrary or unreasonable exercise of the power through laws or regulations.

354 Equal protection

The legislature may, in the exercise of its police power, create reasonable classifications in order to eradicate or ameliorate what it perceives to be a social evil. In reviewing the constitutionality of such legislation under the equal protection provisions of the state constitution, the sole function of the judiciary is to determine whether, in the exercise of its police power, the legislature has unreasonably encroached upon private rights vouchsafed to the people by the Constitution. The guarantee of equal protection of the law may operate as a limitation on the state's exercise of its police powers, although this is not to say that legislation enacted pursuant to the police power must apply equally and uniformily to all; it is sufficient if the classifications created are reasonable and practicable, bearing a rational relationship to the governmental purpose to be served. The equal protection clause of the Fourteenth Amendment of the United States Constitution thus does not limit the police power of the state, nor does it affect a proper exercise of such power. But in the consideration of the relationship between the equal protection clause and the police power of the states, the principle must be kept in mind that as in the regulation of all rights secured from infringement by federal constitutional guarantees, it is settled that the police power is subordinate to the constitutional guarantee of equality of privilege and of burden contained in this clause. Therefore, any attempted exercise of police power which results in a denial of the equal protection of the laws is invalid.

Under the limitations of the equal protection clause, in order to justify the interposition of the authority of the state in enacting police regulations, it must appear that the interests of the public generally -- as distinguished from those of a particular class require such interference -- because it is a rule that the police power cannot be invoked to protect one class of citizens against another class unless such interference is for the real protection of society in general. Where it is actually for the benefit of society, however, the state may enact such laws for the safety and protection of its citizens as the circumstances and necessities of a particular class may require without violating any constitutional guarantee. Stated differently, the rule is that, in the exercise of the police power, the legislature may make classifications to subserve public objects, perfect uniformity of treatment of all persons being neither practical nor desirable.

355 Obligation of contracts; generally

The "impairment of contracts" clause of the United States Constitution, which provides that no state shall pass any law impairing the obligation of contracts, does not operate to obliterate the police powers of the states, and does not prevent

the states from acting pursuant to their police powers to promote the public welfare. Nor does the clause restrict the power of the states to legislate in the interest of the morals, health, and safety of the public, notwithstanding that one or more of these factors may be involved in contracts of various kinds. Rights and privileges arising from contracts are subject to regulation for the protection of the public health, safety, and morals, in the same sense and to the same extent as is all property, whether owned by natural persons or corporations. Indeed, all contracts are made subject to the paramount authority of the state to safeguard the vital interests of its people, and all contracts made with reference to any matter that is subject to regulation under the police power must be understood as made in reference to the possible exercise of that power. The authority of the legislature, in the exercise of its police powers, cannot be limited or restricted by the provisions of private contracts between individuals, or between individuals and corporations. Thus, not all police legislation which has the effect of impairing a contract is obnoxious to the constitutional prohibition as to impairment; a statute passed in the legitimate exercise of the police power will be upheld by the courts, although it incidentally destroys existing contract rights.

However, the clause imposes some limits upon the power of the state to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power. The clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation; whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power, and the scope of the state's reserved power depends on the nature of the contractual relationship with which the challenged law conflicts.

356 Determination of whether police power measure violates contract clause

The first step in determining whether a particular exercise of the state's police power burdens or permissibly interferes with obligations arising under an existing private contract is to inquire into the severity of the enactment's impact on the contract; if such inquiry reveals only a minimal alteration of contractual obligations, there is no violation of the contract clause. If the impairment of contract worked by the enactment in question is sufficiently significant to enable the court to proceed further, the court must determine whether the impairment is both reasonable and necessary to fulfill an important or legitimate public purpose. Factors which are to be considered indicative of the reasonableness and necessity of police power measures impairing private contracts include the existence of an emergency requiring the enactment in question. The clear intent of a regulation to protect a basic interest of society, as opposed to the special interests of individuals or groups, also tends to establish its necessity and reasonableness. The means adopted must be reasonably adapted to the accomplishment of the legislative end and must not be arbitrary or oppressive. While even a substantial impairment of a contractual obligation may pass constitutional muster if it is reasonable and necessary to serve an important public purpose, it has been said that it must be clearly shown that the public interest requires the abrogation in question. As to the question of necessity and reasonableness, the United States Supreme Court has said that it is often appropriate to defer to the state legislature's judgment in the matter, although it has also been said that such deference should not be granted under all circumstances.

Observation: Where the statute or regulation at issue applies to an area that has historically been subject to extensive state regulation, an individual's expectations as to the immutability of contract are reduced, and such a statute or regulation is more likely to be upheld.

The United States Supreme Court has also recognized the existence of various circumstances which, apart from any determination of necessity and reasonableness, will render a police power measure affecting private contracts permissible notwithstanding the contract clause. In addition to the circumstance that such a measure merely affects contractual remedies, the Court has acknowledged that the operation of the measure exclusively upon subsequent contracts, rather than pre-existing agreements, will render it outside the purview of the contract clause, and hence valid. Consistent with this reasoning, the Court has recognized that state police power enactments do not impair the obligations of contracts in violation of the contract clause where they simply validate theretofore void or voidable private contracts, or limit private parties to the benefit of their original bargains.

357 Emergency legislation

The legislature's right, subject to limitations, to enact statutes during emergencies to cope with unusual exigencies is based upon the police power which is reserved to the legislature, but that power is subject to certain constitutional restraints; and a law depending upon the existence of an emergency to uphold it may cease to operate if the emergency ceases, even though the law was valid when passed. Thus, when the exercise of the reserve power of the state, in order to meet a public need such as a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. But it is settled that the police power may be exercised without violating the true intent of the provision forbidding impairment of the obligation of contracts, in directly

preventing by a temporary and conditional restraint the immediate and literal enforcement of a contractual obligation, where vital public interests would otherwise suffer. A statute which impairs the obligation of a contract may be justified in times of emergency as such an exercise of the police power. An economic crisis may be such an emergency; it cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions with respect to the enforcement of contracts if made necessary by urgent public need produced by economic causes. A serious shortage of natural gas for consumption and use by consumers within the state is another illustration of an emergency warranting exercise of the police power by way of a temporary and statewide order of the public utilities commission, binding on all parties to contracts for the sale and purchase of natural gas, whether municipalities, corporations, or individuals. Wage control and rent control laws have also been upheld as against the contract clause.

Observation: Although acknowledging that the existence of an emergency need is one of the factors which may justify a state's exercise of its police power in a way that affects private contracts, the United States Supreme Court has nevertheless declared that this does not mean that only an emergency of great magnitude can constitutionally justify a state law impairing the obligations of contracts.

358 Appropriation of private property

The fact that police laws and regulations may prevent the enjoyment of certain individual rights in property without providing compensation therefor does not necessarily render such laws unconstitutional as violating the Due Process Clause or as appropriating private property for public use without compensation. Such laws, when reasonable and adapted to the scope and objects covered by the police power, are not considered as appropriating private property for public use, but simply as regulating its use and enjoyment by the owner. If the owner suffers injury, it is either damnum absque injuria, or, in the theory of the law, the owner is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure.

Under the foregoing principles, it is settled that as a general rule, regulations which the state authorizes in the proper exercise of its police power with respect to the use of property are entirely independent of any question of compensation for such use. Hence, acts done in the proper exercise of the police power which merely impair the use of property do not constitute a taking within the meaning of the constitutional requirement as to the making of compensation for the taking of property for public use, and accordingly do not entitle the owner of such property to compensation from the state or its agents or give him or her any right of action for the injuries sustained.

Observation: For purposes of determining whether governmental regulation of the use of property constitutes a "taking" for purposes of the Fifth Amendment's injunction against the taking of private property for public use without just compensation, confiscation may result from a taking of the use of property without compensation quite as well as from the taking of title to property. The fact that the governmental regulation prevents the most profitable use of property is not dispositive inasmuch as a reduction in the value of property is not necessarily equated with a "taking."

The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, morals, or safety of the public is not burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. It has even been held that, under the police power, no payment need be made for a diminution in the allowable use of such property, even though it amounts to an actual taking or destruction of the property.

Governmental action in the form of regulation may be so onerous as to constitute a taking which constitutionally requires compensation. There is no set formula to determine where regulation begins and taking ends. There is no abstract or fixed point at which judicial intervention under the takings clause (which is applicable to the states through the Fourteenth Amendment) becomes appropriate, and although formulas and factors have been developed in a variety of settings, resolution of each case ultimately calls as much for the exercise of judgment as for the application of logic. The general rule that a diminution in the value of property resulting from the proper exercise of the police power does not require compensation must be restricted to cases of regulation, impairment, or destruction. The state, under the police power, cannot in any manner actually take and appropriate property for public use without paying appropriate compensation, for such action is repugnant to the constitutional guarantee that where private property is appropriated for public use, the owner shall receive reasonable compensation.

There is a vital difference, which is recognized by the authorities, between an act passed with exclusive reference to the police power of the state, without any purpose to take and apply property to public uses, and an act which not only de-

clares the existence of a nuisance created by the condition of particular property, but in addition, and as the best means of accomplishing the end in view, authorizes the same property to be appropriated by the public.

Observation: Simply denominating a governmental measure as a business regulation does not immunize the measure from constitutional challenge on the ground that the measure constitutes an uncompensated taking.

The United States Supreme Court has laid down the rule that there is a definite limit to the extent to which the legislature may restrict the use of property under the police power. If the regulation goes too far, it will be recognized as a taking. The general rule has also been held to be inapplicable in any instance in which private, personal, and property rights are interfered with, injured, or impaired in a manner, by a means, or to an extent that is not reasonably necessary, to serve a public purpose for the general welfare.

A restriction placed on private land for the benefit of a particular public improvement is the taking of an easement by eminent domain and must be accompanied by compensation. Thus, if private property is actually appropriated for a hospital or a prison, or for the purpose of abolishing a dangerous grade crossing, the power of eminent domain, and not the police power, is being invoked.

Mere regulation which has no direct regard for the public health, morals, or safety, or, in the view of some authorities, welfare, or is not reasonably adapted to its purpose, or arbitrarily discriminates between classes, is unconstitutional. The unconstitutionality in such a case is frequently ascribed to the due process clause. Absent the factors of governmental displacement of private ownership, occupation, or management, the proper remedy for an invalid police regulation is a declaration of unconstitutionality and not compensation for a taking as in eminent domain. The only exception to that limitation is where the government intends that the property will eventually come into public ownership, or where the government has already intruded upon the property and inflicted virtually irreversible damage.

359 Freedom of speech, press, religion, and assembly

The constitutional rights of freedom of speech and of the press are subject to such reasonable regulations as are necessary to promote and preserve the public welfare. Thus, for instance, a municipal ordinance prohibiting the posting of signs on public property is not unconstitutional as applied to the expressive activities of a group of supporters of a political candidate. Although signs are a form of expression protected by the free speech clause of the Federal Constitution's First Amendment, governments may, consistent with the First Amendment, regulate the physical characteristics of signs, just as states may, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise, inasmuch as signs take up space and may sometimes obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation and are subject to municipalities' police powers. And while the First Amendment to the United States Constitution does not prevent a private shopping center owner from prohibiting the distribution on center premises of handbills unrelated to the center's operation, this does not limit a state's authority to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution. Therefore, a state, in the exercise of its police power, may adopt reasonable restrictions on private property so long as such restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision.

The existence of the right of freedom of speech does not require legislators to be insensitive to claims by citizens to comfort and convenience, or to a legislative body's desire to curtail visual clutter resulting from the posting of signs on public property.

The freedom of religion guaranteed by state and federal constitutional provisions may properly be limited by the appropriate legislative body to the times, places, and methods for the enlightenment of the community which, in view of existing social and economic conditions, are not at odds with the preservation of peace and good order. The constitutional protection of religious freedom does not provide immunity from compliance with reasonable civil requirements imposed by the state in the interest of public welfare, and does not bar legislative control of acts inimical to the peace, good order, and morals of society. State legislatures may regulate conduct for the protection of society, and insofar as their regulations are directed toward the proper end and are not unreasonably discriminatory, they may indirectly affect religious activity without infringing the constitutional guarantee.

As are the freedoms of speech, press, and religion, the freedom to assemble peaceably and to petition the government, guaranteed by the First Amendment, is subject to reasonable regulation to protect the general welfare.

Observation: A control and restraint by the state under its inherent police powers, which would otherwise be intolerable under the Constitution, may be justified if the regulation serves a significant state interest that is not present in the case of an adult, which arises from the fact of some rationally perceived youthful vulnerability to harm.

In the use of its police power, a state may not unduly suppress a free communication of views under the guise of conserving desirable conditions. Thus, a state may not pass so-called "hate crimes" legislation because the authority of the state to regulate in this area is limited, and because the state may not exercise its police power in a manner repugnant to the fundamental constitutional rights guaranteed to all citizens.

Regulations in the interests of public safety, health, welfare, or convenience may not abridge the individual liberty secured by the Constitution to those who wish to speak, write, print, or circulate information or opinion; and an individual or group of individuals may not be deprived of their constitutional rights of assembly, speech, and worship merely because they have become so unpopular with, or offensive to, the people of a community that their presence in a public place to deliver a lecture may, or is even likely to, result in riot and bloodshed.

Although the state may place modest and reasonable restrictions on the free exercise of religion regarding the times, places, and methods it may be practiced, it is nonetheless true that only the gravest abuses, endangering paramount interests, give occasion for any permissible limitation of religious freedom itself; no showing merely of a rational relationship to some colorable state interest will suffice.

360 Other provisions

The "privileges and immunities" provisions which are contained in some state constitutions and in Article IV, ß 2, of, and the Fourteenth Amendment to, the Federal Constitution, do not abridge the right of self-protection inherent in a state and reserved when the Federal Constitution was adopted. The privileges and immunities of federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as are necessary for the general good, and such provisions do not interfere with the power of the state to protect the lives, liberty, and property of its citizens and to promote their health, morals, education, and good order.

In other cases involving the interplay of the police power and various constitutional provisions in which there have arisen questions whether such provisions operate as a limitation upon the police power, the governing rules would appear to be the familiar ones that a proper exercise of the police power does not violate such constitutional provisions and that such provisions were not intended to limit the police power, but that such provisions may not be violated by unconstitutional measures enacted under the guise of the police power. Such rules have been applied in cases involving constitutional provisions relating to bills of attainder, or retrospective laws in general, unreasonable searches and seizures, the commerce clause, the supremacy clause, the general welfare clause, and various other provisions.

361 General scope of power

While the scope of the police power is quite extensive, it must still always be borne in mind that such power can only be exercised for proper purposes, having reference to the protection of the public welfare, health, safety, or morals, and within the limitations generally applicable thereto. The breadth and adaptability of the police power as well as its power to cover the public needs are of the greatest significance in determining the objects to which it extends. Thus, even though it may be difficult to formulate a satisfactory definition of the term "police power," there seems to be no doubt that the power extends to the protection of the lives, health, and property of the citizens, to the preservation of good order and the public morals, to the restraint and punishment of crime, to the protection of wildlife, and to the preservation of the general welfare of the community. In general, it extends to the enactment of all such wholesome and reasonable laws not in conflict with the constitution of the state or the United States as may be deemed conducive to the public good.

Observation: In this connection, the terms "public" and "good" are of fundamental importance; an exercise of the police power must have in view the citizens of the sovereignty as a whole, as distinguished from the interests of a particular group or class. Clearly, the police power is not designed to permit the aiding or subordinating of one group in a community as against another. But when the primary objective of an enactment is the public interest, an incidental benefit to some person or organization will not render the enactment void.

Similarly, the term "general welfare" means that legislation, to be justified and supported by that term, must at least promote the welfare of the general public as contrasted with that of a small percentage or insignificant numerical proportion of the citizenry, although it is not essential that the act relate to every member of the public. Education is one of the purposes for which the police power may be exercised.

While formerly the police power was viewed as one of strict and direct application, it has now come to be more favored because of changed and changing economic and social conditions, and at present is frequently relied on to sustain laws which affect the common good in only an indirect way. Furthermore, the ramifications of modern economic and social conditions have enlarged the conditions under which the police power may be exercised for the purpose of suppressing practices that are repugnant to the morals, health, and welfare of the country. On the other hand, an exercise of the police power will not be upheld where its use tends only to create a monopoly or special privilege, and does not tend to preserve the public health, safety, or welfare.

362 Necessity that public benefit be commensurate with private detriment

To be truly in the public welfare and thus superior to private property rights, legislation must confer upon the public benefits commensurate with its burdens upon private property. The police power does not justify an interference with constitutional rights which is entirely out of proportion to any benefit redounding to the public.

It is only because the welfare of the whole people so far outweighs the importance of the individual whose rights are interfered with by an exercise of the police power that such interference with constitutional guaranties can be justified. Thus, the imposition of unreasonable burdens or expenses on persons or property may affect the constitutionality of a statute enacted under the police power.

363 General welfare

The concept of public welfare is broad and inclusive, and the values it protects are spiritual as well as physical, aesthetic as well as monetary. The meaning of the term "general welfare" is as incapable of specific definition as is the police power itself. The public welfare embraces a variety of interests calling for public care and control. These are the primary social interests of safety, order, and morals, economic interests, and nonmaterial and political interests.

The general rule is well settled by many decisions dealing with widely varied specific subjects that the police power extends to the enactment of laws which promote the public welfare. For this reason regulation which is reasonably applied and which will promote community development finds support in the police power; and legislation which is necessary or appropriate to protect the general welfare of the people, and is reasonable in its operation and effect, is a valid exercise by the legislature of the police power. The power of the legislature in this respect and its discretion in the employment of means to achieve promotion of the general welfare are very great.

Observation: The mere fact that a governmental act benefits a private party does not necessarily mean that it does not also advance the public welfare. Where different persons have incompatible interests in the same property, the state can legitimately exercise its police power to protect the interest that matters most to the public welfare, even at the cost of the uncompensated destruction of other interests.

A proper general welfare purpose may exist where it is sought to serve the future, as distinguished from the present, welfare of the public. Thus, the police power extends to anticipation of future needs and the adoption of steps reasonably calculated to obviate them, as by the establishment of a system of unemployment insurance taxes, or welfare programs for needy or indigent persons, or the institution, before the advent of widespread unemployment, of a scheme of public works designed to combat such unemployment if it occurs.

Legislation enacted in the name of the public welfare is not per se valid. Thus, a legislature cannot, under pretense of exercising the police power, enact a statute which does not actually concern the welfare of society. When there is no fair, just, and reasonable connection between the law and the common good, and it is manifest that such was not the object of the statute, it will not be sustained.

364 Physical welfare and public safety, generally

As previously noted, the police power of the state is defined, among other things, as that which enables states to pass regulations for the safety and welfare of the people; it stands to reason, therefore, that one of the most important fields of legislation in which a state may enact measures under the police power is that of regulation in the interest of public safety. While, in the exercise of its police power, a state may enact a statute to promote the public safety or welfare, the authority of the state to regulate is limited, and the state may not exercise its police power in a manner repugnant to the fundamental constitutional rights guaranteed to all citizens.

Observation: In line with the foregoing rule, a variety of public safety and welfare regulations dealing with a number of diverse topics has been held constitutional. Thus, while information maintained by the state in a list of suspected child abusers may be damaging to a subject's reputation if revealed publicly, keeping it is a legitimate exercise of the

state's police powers and does not implicate constitutional concerns. A city, county, or state may lawfully pass an ordinance banning the manufacture, sale, or possession of assault and other dangerous weapons, because such is reasonably related to the legitimate governmental interest of preventing crime and ensuring public safety, is a valid exercise of the police power, and does not violate the right to bear arms in self-defense. And smoking may be prohibited in certain places as a matter of safety to prevent fire or explosion.

An act is within the state's police power if it is reasonably related to a legitimate governmental interest in the public's safety and welfare, and the state has a prerogative to safeguard its citizens from potential harm when such harm outweighs the interests of the individual. In furthering the objectives of promoting the safety and welfare of the public, the state may subject persons and property to restraints and burdens, even those which impair "natural rights."

Observation: Those who challenge bona fide state safety regulations must overcome a strong presumption of validity. Social or economic legislation which purports to protect the welfare and safety of citizens is presumed to be valid and not violative of the due process or equal protection clauses if the classification drawn by the statute is rationally related to a legitimate state interest; the general rule does not apply when the statute involves a suspect classification such as race, alienage, or national origin, or a "quasi-suspect" classification such as gender and illegitimacy, or if the statute affects personal and fundamental rights.

The fact that state regulation may affect interstate commerce does not necessarily render it invalid; the United States Supreme Court has stated that the Constitution, when conferring upon Congress the regulation of commerce, never intended to cut the states off from legislating on all subjects relating to the lives and safety of their citizens, though the legislation may indirectly affect the commerce of the country. Indeed, few constitutional questions can arise over laws enacted to secure and maintain the safety of the populace, except such questions as relate to the mode of exercise and extent of application of the regulations. Under its police power the state may require elimination of a significant danger to life and property, or may impose upon those responsible for the danger an absolute duty to safeguard against it. But a legislative body will not be allowed to abuse its police power simply by vague references to safety hazards in its regulations.

The power to enact police measures in relation to matters of public safety is a continuing one: merely because the state has tolerated conditions inimical to the public health and safety in the past, it is not precluded from taking appropriate steps to end them in the future.

365 Public health; bans on smoking

To conserve and protect the health of its citizens is a paramount duty of the state, and a fair and reasonable exercise of the sovereign power. Thus, the broad power of a state to establish and enforce standards of conduct within its borders relative to the health of everyone therein is a vital part of its police power. Great latitude is allowed to the legislature in determining the character of laws intended to protect the public health, and how, when, and by whom, in their practical administration, they should be applied. States have great leeway as part of their police function to adopt summary procedures to protect the public's health.

The broad power to establish and enforce standards of conduct relative to the health of everyone within its borders is a vital part of the state's police power. When the validity of any health regulation is questioned, the test adhered to by the courts is whether the regulation has some actual or reasonable relation to the maintenance and promotion of the public health, and whether health is in fact the end sought to be attained.

Health regulations under the police power may cover many other subjects besides human beings. For instance, valid laws of this nature include inspection and quarantine regulations in reference to goods, freight, animals, and livestock. Also, the seizure and disposal of neglected animals falls squarely within the state's police power, is permissible without just compensation, is not a taking for a private purpose, and does not violate substantive due process.

The police power of the state to prohibit smoking in close and confined places, such as theaters and public conveyances, has been recognized. While some older authority supports the proposition that an absolute prohibition of smoking in streets, parks, or other public places or anywhere within the corporate limits of a municipality is unreasonably broad and unconstitutional, more recent authorities have upheld broad prohibitions upon smoking in at least some public places.

366 Public morals

A cardinal principle involved in the exercise of the police power establishes the well-settled but often challenged rule that the police power may be exerted to preserve and protect the public morals. Therefore, any practice or business the

tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, may be a legitimate subject for regulation or prohibition by the state. The most obvious illustrations are gambling, nude dancing, prostitution, sodomy, and lewdness, indecency, and obscenity. The police power is exercisable to protect and preserve public morality because the destruction of morality renders the power of government invalid, government being no more than public order.

Caution: The exercise of the police power under the heading of preserving public morality is, of course, only valid where the matter sought to be regulated actually affects the public morals, and if it does not transgress the boundaries fixed by the Constitution for freedom of speech or association, or the right to privacy.

367 Public peace, good order, and comfort

The police power includes the right of the state to enact laws necessary to secure the peace, good order, dignity, protection, and comfort of the community, the promotion of domestic tranquillity, and the comfort and quiet of all persons. Included in this object of the power is a large group of offenses and acts amounting to questionable conduct which, if permitted to be committed untrammeled, would seriously disrupt the public peace. Thus, control of noise is within the police power.

368 Public convenience and general prosperity; economic or financial welfare

The police power is properly exercisable for the enhancement of the public convenience and the general prosperity. Indeed, the exercise of the police power finds its justification only in the promotion of public health, safety, welfare, and good order to the end that the public convenience and general prosperity may be attained. The power is not limited to the protection of the public health, morals, and safety, but extends also to economic need and the need to protect the public from economic harm. Thus, the exercise of the power may include legislation to increase the industries of the state, develop its resources, and add to its welfare and prosperity. Under the police power the state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare and to enforce that policy by legislation adapted to its purpose. Indeed, it seems that the police power may be exercised for aesthetic purposes in a situation in which it appears that aesthetics are directly related to the general economy, as where it is sought to promote the tourist industry by preservation of natural scenic beauty.

The police power may be exercised to protect the public from financial loss; but the legislature may not use the power merely to compel the payment of indebtedness. And if, in the interest of general welfare, the police power may be exercised to protect citizens and their businesses in financial and economic matters, it may similarly be exercised to protect the government itself against potential financial loss and the possible disruption of governmental functions.

369 Protection of environment or ecology

State or local regulations for the protection of the natural environment or the ecology of an area are within the scope of the police power. Thus, for example, air and water pollution control programs, sanitary landfill statutes, wildlife protection programs, statutes requiring permits for the disposal of solid waste, and legislation requiring restoration of land surfaces following strip, open-pit, and other similar methods of surface mining have all been sustained as valid exercises of the police power. And it has been noted that inadequate systems of sewage disposal present ecological problems, and may also pose direct and immediate health hazards, requiring remedies to be fashioned under the state's police power. In the case of an exercise of the police power in a fashion designed to protect the natural environment, the test is not whether there is a clear and present danger to the environment which justifies the legislation; rather, it is whether the legislative body could have determined on any reasonable basis that the legislation is necessary or desirable for its intended purpose. However, a state may not use its admitted powers to protect the health and safety of its people as a basis for suppressing competition, and a state cannot escape such principle by cloaking objectionable legislation in the fashionable garb of environmental protection.

370 Conservation of natural resources

The protection and conservation of the natural resources of a state is in the general welfare and serves a public purpose, and so constitutes a reasonable exercise of the police power. A state is justifiably concerned with preventing rapid and uneconomic dissipation of one of its chief natural resources, and it therefore may enact proper police legislation to prevent waste. Thus, for example, regulation in the public interest has generally been upheld with respect to gas and oil operations, mining operations, forests and forest lands, and water resources. Similarly, the waste of food fish may be prevented in pursuance of the public policy which aims to protect and conserve such fish for the benefit of present and future generations of the people of the state. But a state has no absolute power, either through the exercise of its police power or the exercise of any other of its quasi-sovereign rights, to prohibit or restrict the exportation of its natural resources, such as mineral products, since any such attempted restriction is an interference with interstate commerce, and the fact that the purpose of the regulatory or prohibitory legislation is to conserve or reserve the natural resources of the state for the use of the inhabitants thereof, present and future, does not cure the invalidity.

371 Prevention of fraud

The police power of the state extends beyond regulations necessary for the preservation of good order or the public health and safety; the prevention of fraud and deceit and cheating and imposition is equally within the power, and this power may be exercised to protect not only the intelligent and prudent, but also the ignorant and rash. A state may prescribe all such regulations as, in its judgment, will secure or tend to secure the people against the consequences of fraud, and may institute any reasonable preventive remedy required by the frequency of fraud or the difficulty experienced by individuals in circumventing it, especially when other means have not proved to be efficacious. A state statute designed to prevent the deception of consumers of particular goods is a valid exercise of the state police power, even though it cannot be classified as a health measure, because neither logic nor precedent invites any distinction between state regulations assigned to keep unhealthy or unsafe commodities off retailers' shelves and those designed to prevent the deception of consumers. In many instances the regulation of a business by the state is proper for the sole reason that the nature of the business is such as will encourage fraud on the part of those engaged in it, or that fraudulent schemes or dealings are either appurtenant to its operation or so closely allied with it that the public must be protected from its dangers. In short, the promotion of fair dealing is a legitimate exercise of the police power.

Illustrative of the many and varied regulations aimed at the suppression of fraud and deception are state laws governing the issuance and sale of securities (commonly referred to as "blue sky laws"), laws regulating sales of personal property, laws to prevent false or misleading advertising, laws relating to the manufacture and sale of food, and laws regulating and controlling weights and measures.

372 Generally

Under its inherent police powers, the state has the right to regulate any and all kinds of businesses in order to protect the public health, morals, and welfare of its people, subject to the restrictions of reasonable classification. The reverse of this general rule is also well settled, namely, that the state under its police power does not have the right to regulate any business where there is no threat to, and no need to protect, the health, morals, and welfare of the general public. Laws may also exact costs from private businesses, including the costs of regulation, as a reasonable use of the police power.

The constitutional right of every person to pursue a business, occupation, or profession is subject to the paramount right of the government as a part of its police power to impose such reasonable restrictions and regulations as the protection of the public may require. Thus, if a vocation or the mode of exercising it is injurious to the rights of others or is inconsistent with the public welfare, it may be regulated and restrained by the state. Neither the federal nor any state constitution secures to any person the liberty to conduct a business so as to injure the public at large or any substantial group. In short, there is no provision in any constitution that suggests the unrestricted privilege of conducting one's business as one pleases to the detriment of the public welfare or of what the legislature deems the general good.

The regulation of a business, the unregulated operation of which may injuriously affect the welfare of others, does not deprive its owner of property without due process of law. And it has been held that if a business itself is a proper subject of police regulation, so are all its incidents and accessories, such as the manner of conducting the business.

States have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. Under this constitutional doctrine, the Due Process Clause is no longer to be so broadly construed that the Congress and state legislatures are put in a straitjacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

373 Lawful pursuits

A calling is not exempt from police regulation merely because it is lawful. The power to regulate occupations and businesses is not confined to the regulation of business that are essentially illegal; it extends to lawful callings as well. Thus, the right of reasonable regulation is a modification of the sweeping generalization that every person has a right to pursue any lawful calling. When any business, lawful in nature, is such that it may be conducted in such a way as to become harmful to the public, or when supervision is necessary to confine it to legitimate channels, the state has a right to throw around it such safeguards as will fully protect the public. An occupation which, though not hurtful in itself, may endanger the health, morals, safety, or general welfare of the public if practiced by those not adequately trained therein by education or experience, or by those not morally qualified or of sufficient age or discretion, may be regulated in the public interest. Thus, the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression or fraud. Moreover, a business may be regulated although it is not a nuisance per se. And the state may regulate a business which may become unlawful by the use of improper and unlawful means, since the right to

exercise the police power is a continuing one, and a business lawful today may, in the future, because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare and be required to yield to the public good.

At the same time, statutes limiting and regulating occupations which, prior to their enactment, were of common right, can find no excuse except as they relate to the public and are for its benefit. The regulation of a lawful business is dependent upon some reasonable necessity for the protection of the public health, safety, morality, or other phase of the general welfare, and unless an act restricting the ordinary occupations of life can be said to bear some reasonable relation to one or more of these general objects of the police power, it is repugnant to constitutional guaranties and void. If a lawful business is of a beneficial character, and not dangerous to the public, either directly or indirectly, it cannot ordinarily be subjected to any police regulation whatever. Clearly, it cannot be prohibited altogether. Limitations on the right to work may be sustained only after the most careful scrutiny.

Observation: However, although there are a number of judicial holdings or statements to the effect that the state may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable or unnecessary restrictions upon them, and that the courts will freely interpose by judicial veto when a lawful occupation is unreasonably and arbitrarily interfered with or restricted under the guise of protecting the public welfare, subsequent decisions have tended to deprive the terms "unreasonable" and "arbitrary" of much of the force they possessed in earlier cases, such later decisions tending to sustain, rather than strike down, regulations affecting lawful businesses or occupations.

374 Professions

In line with the principle that lawful occupations are not beyond the scope of the police power, it is established that under the police power, the legislature may impose such restrictions on the practice of a profession as the protection of the public may require. Thus, the legislature has the power, for the protection of the public, to regulate the practice of any profession which requires the possession of special knowledge, skill, and training, such as professions concerned with health, law, engineering, accounting, architecture, teaching, and the like.

375 Businesses affected with a public interest

Although it is difficult to define and classify exactly what is meant or included in the phrase "business affected with a public interest," a fundamental generalization may be drawn from the authorities that individuals or corporations engaged in occupations in which the public has an interest or use may be regulated under the police power. In general, the legislature may make all such reasonable regulations as it may deem necessary for the protection of the public in its relations with those who carry on a business affected with a public interest. It may interfere whenever the public interests demand such interference, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.

One who devotes his or her property to a use in which the public has an interest in effect grants to the public an interest in that use and must submit to be controlled by the public, for the common good, to the extent of the interest he or she has thus created.

The tendency has been to extend rather than to limit the domain of the principle, and consequently it has been denuded of the limiting element which was originally supposed to beset it -- that to justify regulation of a business, the business must have a monopolistic character. Furthermore, a business may be so far affected with a public interest as to permit legislative regulation, even though no public trust is imposed upon the property and though the public may not have a legal right to demand and receive service. Thus broadened, the concept of business "affected with a public interest" is not confined to industries in the nature of public utilities.

376 Meaning of "affected with a public interest"

The meaning and extent of the phrase "affected with a public interest" have never been completely defined or consistently explained. The United States Supreme Court has declared that the phrase is incapable of exact definition. In two early opinions, the Court declared that "property becomes clothed with a public interest when used in a manner to make it of public consequence and affect the community at large." Subsequently the Court held that the expression "clothed with a public interest" means more than that the public welfare is affected by its continuity or by the price at which a commodity is sold or a service rendered. The circumstances must be such as to create a peculiarly close relationship between the public and those engaged in the business and raise implications of affirmative obligations on their part to be reasonable in dealing with the public. In another case, the United States Supreme Court stated that the phrase "affected with a public interest" means only that an industry, for adequate reason, is subject to control for the public good.

Some state courts have said that any business is clothed or affected with a public interest when it reaches such proportions that the interest of the public demands that it be reasonably regulated to conserve the rights of the public, and that the phrase "affected with a public interest" means that the occupation or industry, when in operation, affects the health, safety, and welfare of the people and that the public is interested to such an extent that reasonable laws can be or may be enacted for its control and regulation. Indeed, one court has said that the phrase "affected with a public interest," when used to describe a business, is the equivalent of "subject to the exercise of the police power."

The tests as to what businesses are affected with a public interest, due to the very nature of the problem, are not specific. The United States Supreme Court has stated that such a phrase forms an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. The Court has said that a business is not affected with a public interest merely because it is large, or because the public is warranted in having a feeling of concern with respect to its maintenance.

377 Legislative and judicial functions in determining businesses included

The determination of what businesses are affected with a public interest is primarily for the legislature. It must be considered, however, that in spite of the fact that it is entitled to great respect, a mere declaration by the legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The matter is one which is always open to judicial inquiry, since private businesses may not be regulated or converted into public businesses by legislative fiat.

378 Generally

The fact that the legislature has invoked its police power to regulate a particular trade is not conclusive on the issue of whether that power was lawfully exercised; the means of regulation which the legislature adopts by statute must have a definite and reasonable relationship to the goal of protecting the public health, safety, and welfare. The reasonableness, and hence the validity, of a regulation of a business depends on the facts. A regulation valid for one sort of business or in given circumstances may be invalid for another business or for the same business under other circumstances. Different callings may be regulated in different ways, because of the manner in which they affect the public. Thus, a business of a character which places it within the category of "social and economic evils," such as gambling or selling alcoholic beverages or tobacco products, may fall within the broad legislative power to prohibit, restrict, or suppress such businesses, while other pursuits, such as agriculture, merchandising, and manufacturing, cannot be so harshly dealt with at will by the legislature. As to them, the power of regulation is comparatively slight.

If a business from its nature so affects the public as to be subject to any regulation, in accordance with the general principle that the legislature possesses great discretion in the exercise of the police power, it may determine not only what trades or occupations shall be regulated, but the nature and extent of the regulations, adopting any measures, not in conflict with the Constitution, that it sees fit, provided they have some relation to, and some tendency to accomplish, the desired end.

379 Prohibitions

Although it has been said that the power to regulate a business or occupation does not necessarily include the power to exclude persons from engaging in it, the general rule is that whenever it is necessary for the preservation of the public health, safety, morals, or peace, or for the promotion of the general welfare of the community, the legislature may prohibit absolutely the carrying on of any particular business, calling, trade, or enterprise. A calling does not have to be immoral in itself to be prohibited. If, in the consideration of the circumstances which ordinarily attend the pursuit of a particular calling, the state thinks that certain admitted evils cannot be successfully reached unless that calling is actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is instead a clear, unmistakable infringement of rights secured by the fundamental law. Thus, to protect the public, the legislature may absolutely forbid the manufacture of an article, notwithstanding its usefulness for some purposes. And a legislative body may prohibit the conduct of certain occupations in particular localities because of the noise made in their pursuit, or the odors they engender, or other features that menace the health, safety, or welfare of the community.

The legislature cannot forbid any person or class of persons from engaging in a lawful business unless it is injurious to others or has a tendency in that direction. Where a business in itself is harmless and legitimate, the power of the state to regulate it is not the equivalent of the power to suppress or destroy. Nondangerous businesses cannot be legislated out of existence. Legislative prohibition of particular occupations is a proper method of ending abuses only when such

abuses are general and difficult to control by regulation, and when they cause or threaten an injury to the public so serious that the legislature might reasonably find it outweighs the harm that would be caused to some by complete prohibition. The right to engage in a lawful and useful occupation cannot be taken away under the guise of regulation, as by imposition of onerous, unusual, or unnecessary restrictions or requirements, although such an occupation may be subjected to regulation in the public interest, even though such regulation involves in some degree a limitation on the exercise of the right regulated.

If the prohibition of a particular business is not a reasonable exercise of the police power for the promotion of the general welfare of the community, but has the effect of granting to one class of citizens a privilege not equally available to all, it is inoperative and void. The legislature cannot prohibit a business if all the reasons assigned for the exercise of the power are merely fanciful.

380 Fixing terms, conditions, and restrictions

The legislature may, under its police power, impose terms and conditions prerequisite to the right to engage in particular businesses and occupations. The power to regulate a particular business, trade, or calling implies the power to fix, within reasonable limits, the terms upon which it may be pursued, and to prohibit the exercise thereof except upon the terms and in the manner so prescribed. But if a calling is so innocent that it must be left open to all alike, the state may not attach conditions to the right to engage therein.

Regulations concerning businesses or occupations often take the form of preliminary requirements to the carrying on of such occupations, such as registering, or the obtaining of a franchise or a license or permit, the deposit of certain sums of money, the posting of fidelity, indemnity, or performance bonds, or the establishment of an accident or insurance fund for employees. And statutes, ordinances, or regulations requiring that applicants for certain specified occupations be fingerprinted have been held to be a proper exercise of the police power, and not violative of equal protection of the laws,[n57] the right to personal liberty or privacy, due process, the privilege against self-incrimination, or the spirit or purpose generally of the Constitution. Similarly, a regulation requiring a certain type of business to furnish the police department with fingerprints, photographs, and penal histories of all employees has been upheld. And when occupations are likely to become inimical to public welfare unless the number is limited by law, the police power may rightfully be exercised to restrict the number, for then a reasonable basis exists for the classification made, and there is justification for the incidental denial of full enjoyment of the privilege by those not within the classification.

Another method of regulation is to restrict the extent of permissible business activity. Thus, it is a valid exercise of the police power to limit the operation of a free business enterprise by means of a proration law which restricts the production and marketing of agricultural commodities to allotted quantities in order to prevent waste and secure the stability of markets. Restrictions occasionally apply to the class of persons permitted to engage in certain callings. Thus, the state may sometimes limit to corporations the right to engage in a particular business. On the other hand, the state also may prohibit a corporation from engaging in certain other callings.

Membership in an association cannot be required as a prerequisite to admission to an ordinary business which is in its nature perfectly legitimate. And the right of the state to make an unreasonable regulation restricting the right to use business property for business purposes has been denied. Similarly, the fact that unscrupulous persons may enter into fraudulent contracts respecting a lawful business is not alone a sufficient ground for the legislature to prohibit lawful contracts respecting that business.

381 Restrictions to qualified persons

The power of the state to provide for the general welfare authorizes it to establish such regulations as will secure or tend to secure the people against the consequences of ignorance and incapacity. To that end, it may exact a certain degree of skill and learning in professions and pursuits which concern the public health and welfare and are of such a character that a special course of study, training, or experience is needed to qualify one to pursue such callings. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only where they have no relation to such calling or profession or are unattainable by reasonable study and application that they can operate to deprive one of his or her right to pursue a lawful vocation. The right to regulate such professions and occupations extends to those already engaged therein, as well as to those seeking for the first time admission to their ranks, for it is generally recognized that no matter how long a person has been in the practice of a profession, he or she does not have any vested right to continue therein.

The exercise of the police power in this respect, however, is not wholly limited to the learned professions and to those occupations which require special training and experience. It also extends to business pursuits which involve none of these characteristics and yet affect the public health, safety, or comfort, such as dealing in food. Also, if a calling is such that the dishonest and unworthy should not be permitted to take advantage of the opportunities presented thereby, they may be prohibited from engaging therein. Thus, certain occupations or businesses may be prohibited to those who have a past criminal record.

382 Restrictions as to place and time

Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them, require regulation as to the locality in which they shall be conducted; in some instances the conduct of a business in a particular place may be prohibited entirely. Zoning laws and regulations restricting the business use of property within particular districts of a municipality are within the proper exercise of the police power. As a general proposition, regulations fixing a closing hour for certain businesses depend for their validity upon the nature of the business sought to be regulated. Such laws are valid if the public health, safety, morals, or welfare may be affected by keeping the business open after certain hours. However, laws requiring businesses of a purely mercantile and commercial nature to close at a specified time have been held unconstitutional, where such regulations do not directly or remotely tend to benefit the public health, morals, safety, or general welfare.

383 Restrictions as to price

Legislation concerning sales of goods, and incidentally affecting prices, has repeatedly been held valid. The power of the government to fix prices does not ordinarily exist with respect to merely private property or business, but ordinarily exists only where the business or property involved has somehow become affected with a public interest. However, the right of the owner of a commodity to determine the price at which he or she may resell it is subject to the legitimate exercise of the police power. A state is free to adopt and enforce whatever economic policy may reasonably be deemed to promote public welfare, whether by promoting free competition by laws aimed at monopolies, or by curbing harmful competition by fixing minimum prices. Thus, where legislation affects an entire class of articles which comprise a reasonable subject of classification, and where the main purpose of the legislation is otherwise justified under the police power, as to curb unfair competition, it may authorize the fixing of prices for that class of articles quite aside from the degree to which traffic in them may affect the public interest.

The United States Supreme Court has recognized that the government may intervene in the marketplace where --

-- rates or prices are artificially inflated as a result of the existence of a monopoly or near-monopoly.

-- a discrepancy between supply and demand in the market for a certain product exists.

-- rent controls are necessary to prevent excessive and unreasonable rent increases caused by a growing shortage of, and increasing demand for, housing in a particular area.

-- price control regulations and taxes are being imposed on government contractors.

A price control law is unconstitutional, as a denial of due process of law, if it is arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is otherwise free to adopt.

384 Imposing liabilities

Closely related to the inquiry as to whether the state in the exercise of its police power may impose expenses and burdens without infringing the constitutional guaranty as to due process of law is the question of the extent to which liability may be imposed for injuries to persons or property due to negligent failure to comply with a police regulation, or for all consequences irrespective of negligence. Immunity from liability for negligence of either oneself or one's agents and servants is not a constitutional right, and it may be taken away without deprivation of due process of law. Thus, legislation imposing liability without fault in various civil matters is frequently sustained as a proper exercise of the police power.

24 Am Jur 2d District of Columbia Summary

District of Columbia Summary

Scope:

This article discusses the government of the District of Columbia, its basis, nature, and attributes; the general method of organization and operation of the District, including the executive, legislative, and judicial branches of government, and liability of the District of Columbia in tort.

Federal Aspects:
This article discusses the federal constitutional provision (US Const, Art. I ß 1, cl. 17) under which the District of Columbia was created and from which Congress derives its authority over the District. Also discussed are miscellaneous federal statutes relating to the creation of, authority of Congress over, and the administration and liability of the District of Columbia. Additionally, the District of Columbia Financial Responsibility and Management Assistance Act of 1995 (P.L. 104-8), an uncodified federal statute providing for various aspects of budgeting and financial affairs of the District is discussed.

1 Generally; constitutional basis of government
The District of Columbia exists by virtue of a provision of the Constitution of the United States, providing that the Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district (not exceeding 10 miles square) as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States. The word "exclusive," was used to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states and not to suggest that the power to exercise such exclusive legislation is nondelegable.

Observation: It has been said that the necessity of complete jurisdiction over the place which should be selected as the seat of government was obvious to the framers of the Constitution.
2 Territorial boundaries
In furtherance of the constitutional design, Maryland and Virginia each ceded a block of their respective territories lying on the Potomac River to the Congress and government of the United States, which were accepted by Congress, the boundaries of the District being established by presidential proclamation of March 30, 1791. Subsequently, that portion of the District which had been acquired from Virginia was returned to that state by an act of retrocession of Congress.

A 1945 Act relating to the boundary line between the District of Columbia and the Commonwealth of Virginia established a "new" boundary line with all the land on the Virginia side of the Potomac River, lying between boundaries set forth in the Act and mean high water mark as it existed on January 24, 1791 being located within the Commonwealth of Virginia, regardless of which state, Maryland or Virginia, the land was located in prior to 1791. This change had no effect on the title to land lying between the 1945 boundary line and the 1791 boundary line; thus, land lying east of the 1791 line and titled in United States and arguably in the District of Columbia was still titled in the United States, notwithstanding that it may have been west of the 1945 line and was clearly not within the Commonwealth of Virginia.

The District of Columbia is that portion of the territory of the United States ceded by the state of Maryland for the permanent seat of government of the United States, including the Potomac River in its course through the District, and the islands therein. All of the territory constituting the permanent seat of the government of the United States will continue to be designated as the District of Columbia.
3 Applicability of federal and state laws to District
The common law, all British statutes in force in Maryland on February 27, 1801, the principles of equity and admiralty, all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force in the District of Columbia on March 3, 1901, are to remain in force except insofar as they may be inconsistent with or are replaced by some provision of the District of Columbia Code of 1901.

The District of Columbia is considered as a state for purposes of actions under specific federal statutes relating to civil rights, and any act of Congress that is applicable exclusively to the District is considered to be a statute of the District. A claim under District of Columbia law does not "arise under federal law" and provide federal court jurisdiction simply because District law incorporates federal law.

Congress has adopted the Uniform Commercial Code for the District of Columbia.
4 Generally
The Federal Constitution invests Congress with authority to exercise exclusive legislation in all cases whatsoever over such district as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States. Under the constitutional provision, Congress is given full or plenary power to legislate for the District of Columbia. The scope of congressional power over the District of Columbia is expansive. If Congress chose, it could govern the District of Columbia directly, without the help of the municipal government or its agencies. The Constitutional guarantee of a republican form of government in every state applies to states and does not restrict the power

of Congress to legislate for the District of Columbia. By force of the constitutional grant, Congress possesses the combined powers of a general and a state government in all cases where legislation for the District is possible.

Illustration: Congress was authorized by the United States Constitution to enact a section of the Washington Metropolitan Area Transit Authority (WMATA) compact that limits jurisdiction over actions against the WMATA to federal courts and courts of Maryland and Virginia.

Congress' plenary power over the District of Columbia means no more than that Congress is akin to a state legislature, and not that the government thereof is not legislative in character. The power of Congress over the District relates to all the powers of legislation which may be exercised by a state in dealing with its affairs. When it legislates for the District of Columbia, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other. When Congress passes legislation for the District of Columbia under the power expressly delegated to it by the Constitution to exercise exclusive legislation in all cases over the District, it acts in like manner as the legislature of a state and may choose to exercise only part of its powers and limit itself to those powers which would be available to a state legislature or it may exercise within the District the general legislative powers delegated to it by the Constitution.

Congress may adopt one rule of substantive criminal law for the District while promulgating a different one for the general federal system.

Congress also has the power to levy and collect taxes in the District of Columbia.

5 Police power

Since the legislative powers of Congress over the District of Columbia are unlimited, the power of Congress to enact regulations affecting the public peace, morals, safety, health, or comfort within the District of Columbia is the same as that a state legislature or a municipal government would have in legislating for state or local purposes. The police power of Congress in the District of Columbia is substantially the same under the Fifth Amendment as that which may be exercised by the states under the limitations of the Fourteenth Amendment. Although the police power fundamentally belongs to the states and not to the federal government, the right to exercise it for the general good is an inherent attribute of sovereignty, with the result that Congress could exercise the police power with respect to matters local to the District of Columbia. Accordingly, Congress' exercise of the police power in legislating for the District has been upheld by the courts in various specific instances, including the enactment of legislation to police drug activity in the District of Columbia, the enactment of the District of Columbia Redevelopment Act of 1945, the regulation of life insurance contracts, and the enactment of legislation prohibiting and penalizing combinations for the purpose of fixing prices for services.

6 Delegation of powers

The exclusive legislative power of Congress with respect to the District of Columbia may be delegated to the District itself, subject to the constitutional limitations to which all lawmaking is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted. Congress may also delegate all or part of its plenary legislative power over the District of Columbia to other bodies, and may make such allocations of power among those bodies as it deems appropriate. The District of Columbia Court Reform Act and Home Rule Act did not repeal by implication former statutes delegating power to federal agencies where the congressional delegation of power was of long standing and consistent with the express provisions of both Acts.

Illustration: Congress, by enactment of a statute creating the District of Columbia Financial Responsibility and Management Assistance Authority and amendments thereto, delegated its plenary power to run the schools of the District of Columbia to the Authority.

The District of Columbia Self-Government Act does not bind Congress to the Contract Clause for congressional legislation for the District of Columbia despite delegation of legislative authority to local officials. The Act expressly recognizes congressional authority to exempt congressional legislation for the District of Columbia from any contract clause limitation.

7 Pre-emption

Neither the District of Columbia Council nor its electors can overrule acts of Congress. The District is not authorized to repeal legislation national in scope, notwithstanding that the repeal would affect enforcement of legislation only within the District's jurisdiction.

Illustration: A District of Columbia Mental Health Information Act dealing with mental health records was pre-empted by a federal veteran's record statute comprehensively regulating the disclosure of veteran's records, as was a District of Columbia law controlling the release to insurance carriers of sensitive patient information which would require carriers to disobey federal regulations. Similarly, a District of Columbia scheme of regulation establishing level of care distinctions in the licensing and regulation of nursing facilities was pre-empted by a federal scheme establishing a single standard of care. A federal act pre-empted a District of Columbia Act providing alternatives to traditional punishment of addicts where the federal and District statutes defined the class of eligible addicts differently. A District of Columbia Code provision stating that a borrower making more than a 20 percent down payment cannot be required to make escrow payments of real estate taxes or casualty insurance was pre-empted by a directly contrary federal statute dealing with federal savings and loan associations. The pre-emption provision of Petroleum Marketing Practices Act pre-empted only those provisions of the District of Columbia Retail Service Station Act which addressed termination, nonrenewal, or notice required with respect to those practices.

8 Generally; as municipal corporation

The District of Columbia is a distinctive and unique governmental unit. It has been declared by Congress to be a body corporate with all the powers of a municipal corporation, yet the District is not strictly a local municipal authority because of its peculiar status as the seat of the national government.

Illustration: Although the District Court for the District of Columbia has held that the United States park police has concurrent jurisdiction with the metropolitan police department within the District of Columbia, and thus the park police is authorized to operate in the District of Columbia outside of the parks themselves, the District of Columbia Court of Appeals has disagreed and held that Park Police lack statutory authority to be issued search warrants.

The United States, as a sovereign power, is entirely separate and distinct from the District of Columbia as a municipal corporation. The District of Columbia is not an agency or instrumentality of the United States, and the United States Government is not liable for the obligations of the District of Columbia as a municipal corporation unless Congress has otherwise provided. The District of Columbia, in turn, is a municipal corporation, and not a department of the federal government, as such, the District may not, for example, rely on federal limitation of action statutes.

The District of Columbia, as a municipal corporation, is exempt from garnishment proceedings to collect a judgment owed by one of its employees.

9 As state or territory

While the District of Columbia is not a state, the District exercises many governmental functions commonly performed by states.

Although subject to complete control by Congress, in many respects the District is an entity separate and apart from the general federal system, the powers of Congress over the District being in the nature of those of a state legislature. When Congress acts as a local legislature for the District of Columbia and enacts legislation applicable only to the District of Columbia and tailored to meet specifically local needs, its enactments should, absent evidence of contrary congressional intent, be treated as local law, interacting with federal law as would laws of the several states. However, the laws enacted by Congress as special legislation applicable only to the District are not the general laws of the United States.

For some purposes, the District of Columbia is classified as a state. Thus, it is deemed to be a state within the meaning of certain treaties and acts of Congress. The District of Columbia can also be viewed as a state for the limited purpose such as creating an interstate agency. The extent to which the District of Columbia's rights and responsibilities as defined under a particular statute resemble those of a state must be determined by ascertaining congressional intent on a case-by-case basis.

Judgments rendered by courts of the District of Columbia are entitled to full faith and credit in the courts of the several states, and, conversely, District of Columbia courts must accord full faith and credit to judgments rendered by state courts. The District of Columbia has also been referred to as a territory.

10 Effect on rights of citizens

A citizen of the District of Columbia is not a citizen of a state. For many years citizens of the District of Columbia had no voice in the election of the president and vice-president of the United States; by constitutional amendment, however, the District now chooses electors of these offices in the same manner and to the same number as if the District were a state, but not more than the least populous state.

The District of Columbia is not a state within the intendment of the constitutional provision conferring jurisdiction upon the federal courts in cases of diversity of citizenship. However, by virtue of an act of Congress, the diversity jurisdiction of the federal courts has been extended to citizens of the District of Columbia.

11 Generally

Subject to retention by Congress of the ultimate legislative authority over the nation's capital granted by the Federal Constitution, the District of Columbia Self Government and Governmental Reorganization Act provides that the intent of Congress is to: delegate certain legislative powers to the government of the District of Columbia; authorize election of certain local officials by the registered qualified electors in the District; grant to the inhabitants of the District powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters. Congress also intends to implement certain recommendations of the Commission on the Organization of the Government of the District of Columbia and take certain other actions without respect to whether the charter for greater self-government provided for in the code is accepted or rejected by the electors of the District.

Observation: In structuring the government of the District of Columbia, Congress is not bound by the separation of powers limitations that control its powers at the national level.

12 Designated powers

The District of Columbia has been declared to be a body corporate for municipal purposes, which may contract and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of the District of Columbia Code. The District is responsible for all the duties, obligations, responsibilities, and liabilities, and vested with all the powers, rights, privileges, immunities, and assets, respectively, that are imposed upon and vested in the corporation, as created, or the mayor. The District of Columbia, as sovereign, has the inherent right to control the exercise of police powers within its territory.

Reminder: Neither the District of Columbia Council nor its electors can overrule acts of Congress.

13 Council

The District of Columbia Code provides for the creation of a council for the District and for election of the members thereof by the qualified electors of the District. The Code provides for the qualifications of members of the council for holding office

Illustration: A candidate for a council seat remained a resident of the District, as required to establish eligibility to hold public office, during his period of incarceration in Virginia and Pennsylvania, since he never expressed any intent not to return to the District, and he did indeed return upon his release from prison. Lawrence v. District of Columbia Bd. of Elections & Ethics, 611 A.2d 529 (D.C. 1992). and for their compensation.

The legislative authority and the powers of the council are specified in detail in the code. The District of Columbia Council's interpretation of its responsibilities under the Home Rule Act is entitled to great deference. The authority of the District of Columbia Council is subject to certain general provisions with respect to Congressional authority and to other specific restrictions contained in the code.

Members of the Council are legislators in every traditional sense and, as such, they enjoy broad First Amendment protections in discharging their responsibilities. Thus, under a District of Columbia statute, council members enjoy legislative immunity and may not be questioned in any other place for any speech or debate made in the course of their legislative duties.

Illustration: Members of the District of Columbia city council have a constitutionally protected right to cast unimpeded votes on matters of public importance and thus could not be enjoined from introducing bills that would have abolished the District Lottery & Charitable Games Control Board and were immunized from claims for damages arising from the introduction of these two bills.

However, the District's local speech or debate statute provides no broader protection than speech or debate clause of Federal Constitution.

The Council of the District of Columbia has the power to investigate any matter relating to the affairs of the district and for such purpose may require the attendance and testimony of witnesses and production of books, papers, and other evidence.

The Council of the District of Columbia has authority to repeal, or to amend in more than technical fashion, laws adopted through initiative process.

14 Mayor

The District of Columbia Code creates the office of mayor of the District of Columbia and makes provision for matters relating to election to, qualification for, and compensation payable for such office. The code further specifies the powers and duties of the mayor, with specific reference to matters such as submission of statements of impact of proposed acts and municipal planning. Under the Comprehensive Merit Personnel Act, the mayor is the personnel authority for the Commission.

15 Neighborhood commissions

The District of Columbia Code provides for the division of the District into a number of neighborhood commission areas, the several commissions being given advisory authority as to matters specified. The authority and responsibilities of such commissions are specified in detail in the code.

District of Columbia advisory neighborhood commissions are not entitled to statutory special notice of an adjudicative proceeding unless the proceeding concerns matter specifically listed in the statute governing such notice. However, statutory notice to District of Columbia advisory neighborhood commissions (ANC) is required for proposed governmental decisions affecting neighborhood planning and development, as specified in ANC statutes.

The District of Columbia Board of Elections and Ethics is authorized to adopt, amend, repeal, and enforce all regulations necessary to carry out the provisions of the code with respect to neighborhood commissions and is further directed to take such steps as are necessary to ensure that the election of members of such commissions provided for is held in an efficient manner.

16 Financial Responsibility and Management Assistance Authority

Congress enacted the District of Columbia Financial Responsibility and Management Assistance Act of 1995 to eliminate budget deficits and cash shortages of the District of Columbia, as well as, inter alia, to ensure the most efficient and effective delivery of services by the District government. Pursuant to the Act, the District of Columbia Financial Responsibility and Management Assistance Authority was created.

For each fiscal year for which the District government is in a control period, the mayor must develop and submit it to the Authority a financial plan and budget for the District of Columbia subject to specified standards, which must be reviewed by the Authority, and either be approved or disapproved. Additionally, Acts passed by the District government must be submitted to and reviewed by the Authority. The Authority may also restrict borrowing.

Generally, the annual federal payment to the District of Columbia must be made into an escrow account held by the Authority which must allocate funds to the mayor. The mayor must submit reports to the Authority on actual revenues and expenditures and any variances with the financial plan must be certified to various authorities and the Authority may withhold funds from the District government. The Authority may also submit recommendations to the District government regarding management of District affairs.

The Authority may issue bonds, notes or other obligations to obtain funds for the use of the District government, may pledge or grant a security interest in revenues to purchasers of any issued bonds, notes or other obligations, and must establish a debt reserve fund.

Congress, by enactment of statute creating District of Columbia Financial Responsibility and Management Assistance Authority and amendments thereto, delegated its plenary power to run schools of District of Columbia to Authority.

17 Generally

The Constitution of the United States gives Congress power to exercise exclusive legislation in all cases whatsoever over the District of Columbia. In the exercise of this plenary power, Congress has established a judicial system in the District by vesting the judicial power in three federal and two District of Columbia courts. The federal courts so vested are the Supreme Court of the United States, the United States Court of Appeals for the District of Columbia Circuit, and

the United States District Court for the District of Columbia. The District of Columbia courts so vested are the District of Columbia Court of Appeals[n30] and the Superior Court of the District of Columbia.

18 Nature and character of courts

The courts created by Congress for the District of Columbia are permanent establishments, and are constitutional courts of the United States, being ordained and established under Article III of the Constitution.

Courts of the District of Columbia are considered federal courts to the extent that they may take judicial notice of the laws of all the states.

Illustration: The courts of the District of Columbia in an action to recover damages for a negligent act committed in that jurisdiction causing death in another state, which action is based upon the statutes in such case made and provided, took judicial notice of the statutes of such state.

19 Jurisdiction and powers of courts

Subject to the constitutional guarantees of personal liberty, Congress may vest in the courts of the District of Columbia a variety of jurisdiction and powers. The Congress may clothe such courts not only with the jurisdiction and powers of federal courts in the several states, but with such authority as a state may confer on her courts. It may confer upon them jurisdiction over nonfederal causes of action, or over quasijudicial or administrative matters. And congressional enactments have been sustained which conferred powers on the courts of the District of an exceptional and advisory character. However, jurisdiction conferred by Congress on courts of the District of Columbia is limited by the express terms of the act conferring it.

A party asserting a right under the Constitution of the United States or federal laws may lay venue under either the general federal venue statutes or the special District of Columbia statutes, and the courts of the District may exercise their authority in cases committed to them by either.

20 Judges

The judges of the courts of the District of Columbia system are of equal rank and power with those of other inferior courts of the federal system and hold their offices during good behavior. Their compensation cannot, under the Constitution, be diminished during their continuance in office. The provisions of the Federal Constitution vesting the judicial power of the United States in the Supreme Court and such inferior courts as Congress may establish, with judges having tenure during good behavior and protection against salary reduction, have been held not to require that prosecution for felonies committed in the District of Columbia be presided over by a judge having the tenure and salary protections provided therein. The courts of the District of Columbia, no less than other federal courts, may constitutionally impose only such punishment as Congress has seen fit to authorize, even though the courts of the District of Columbia were created by Congress pursuant to its plenary power under the Federal Constitution to legislate for the District (US Const. Art. I ß 8 cl. 17) and are not affected by the salary and tenure provisions of Article III of the Constitution.

21 Superior Court of the District of Columbia and divisions thereof

The District of Columbia Court of General Sessions, the Juvenile Court of the District of Columbia, and the District of Columbia Tax Court were consolidated in a single court known as the Superior Court of the District of Columbia.

The Superior Court of District of Columbia is a court of general jurisdiction, and has the power to adjudicate actions at law or in equity within its jurisdiction. Though each individual division of superior court is entrusted with specific responsibility, must follow pertinent statutory mandates, and must transfer inappropriate cases to proper division, where a claim is related to subject matter within responsibility of division, that division may rely upon its general equity powers to adjudicate a claim and to award relief.

Except for certain matters begun in specified courts within a designated time of the effective date of the reorganization act, the Superior Court has jurisdiction of any civil action or other matter brought in the District of Columbia and over criminal offenses except as otherwise specified. Unless the legislature has divested the superior court of jurisdiction over particular subject matter though enactment of legislation, a court has general jurisdiction over common-law claims for relief.

Illustration: The District of Columbia court had subject matter jurisdiction over a premises liability action even though the action was between Virginia residents and arose from an incident which occurred in Virginia, as the action was not one in which jurisdiction was vested exclusively in a federal court.

The Family Division of the Superior Court has exclusive jurisdiction of actions concerning divorce, revocation of divorce, support, custody, annulment, adjudication of property rights in such actions, adoption, child delinquency, and certain other proceedings.

The Tax Division of the Superior Court has exclusive jurisdiction of all appeals from and petitions for review of assessments of tax, and civil penalties thereon, made by the District of Columbia, and all proceedings brought by the District for the imposition of criminal penalties pursuant to the code provisions relating to taxes levied by or in its behalf.

The Small Claims and Conciliation Branch of the Civil Division in the Superior Court has exclusive jurisdiction of small claims for the recovery of money, if the amount in controversy does not exceed the statutory sum, exclusive of interest, attorney fees, protest fees, and costs.

The All Writs Act provides the superior court with jurisdictional authority, albeit in rare circumstances, to issue emergency relief pending resolution of agency proceedings.

Illustration: The superior court had jurisdiction to review the Contract Appeals Board's (CAB) decisions in a bid protest, and thus, the superior court also possessed power under the All Writs Act to issue temporary relief to a disappointed bidder, even though the CAB had not yet issued a decision. District of Columbia v. Group Ins. Admin., 633 A.2d 2 (D.C. 1993).

22 District of Columbia Court of Appeals

The District of Columbia Court of Appeals has jurisdiction of appeals from all final orders and judgments of the Superior Court of the District of Columbia and certain orders or rulings of the Superior Court appealed by the United States or the District of Columbia. Such appeals lie as a matter of right, except in the case of judgments of the Small Claims and Conciliation Branch of the Superior Court of the District of Columbia and of certain judgments in the criminal division of that court where the penalty imposed is a fine within specified statutory limits, in which case appeals may be allowed in the discretion of the District of Columbia Court of Appeals.

Practice guide: Notice of appeal must designate the judgment, order, or part thereof from which the appeal is taken as appeals may jurisdictionally be taken only from final judgments and orders and in litigation two or more potentially appealable orders may be entered.

To be "final" so as to entitle adversely affected party to an appeal, a court order must dispose of the whole case on the merits so that the court has nothing to do but to execute the judgment or decree already rendered. Appeals are barred unless the order appealed from disposes of all issues in case; order must be final as to all parties, all subject matter, and all causes of action involved. An order quashing service of process and dismissing a complaint or dismissing a counterclaim without prejudice is an appealable, final order. The denial of a motion to vacate the grant of a mistrial or to limit retrial on the issue of damages or order granting a mistrial or new trial have been held not to be appealable final orders. Applications for the allowance of an appeal would be denied, where an inadequate record existed upon which the Court of Appeals presently should decide most of the issues certified by the trial court, only one of the certified issues, that of pre-emption, could arguably be said to present a controlling question of law, and that issue was open for final determination only by the United States Supreme Court as one of nationwide relevance. The Court of Appeals would not consider issues regarding lessors' claim that rent renegotiation was to be decided by arbitration, even if it had jurisdiction, as issues should not be ruled upon as pure questions of law while facts were still being disputed at the trial court level.

One panel of Court of Appeals does not have the authority to overrule another.

In promulgating rather than applying bar rules, the District of Columbia Court of Appeals acts in legislative rather than judicial capacity; thus, District Court confronted with simple challenge to validity of such rules is not reviewing state-court judicial decision, within meaning of Rooker-Feldman doctrine, and has subject matter jurisdiction.

23 Appeal of interlocutory orders

The District of Columbia Court of Appeals has jurisdiction of appeals from certain interlocutory orders of the Superior Court of the District of Columbia. Such appeals lie as a matter of right. The District of Columbia Court of Appeals has jurisdiction over certain interlocutory orders specified by statute, by court rule, and by collateral order doctrine. Interlocutory appeals may not be taken from an order that appears to be final simply because party has no alternative but to obey or be punished.

However, although it ordinarily reviews only final orders and judgments of superior court, the Court of Appeals will treat certain interlocutory orders as final and collateral, and hence appealable, when they have final and irreparable effect on important rights of parties.

In order for an interlocutory order to be treated as final and collateral and accordingly subject to appellate review, the order must conclusively determine an undisputed question, must resolve an important issue completely separate from merits of action, and must be effectively unreviewable on appeal from final judgment. To fall within the "affecting property" exception to nonappealability of nonfinal orders, an order must change the status quo between the landlord and tenant.

Illustration: A trial court's order granting a vendor possession of real property that was in the possession of the purchaser under an installment land contract was an order changing or affecting possession of property and, thus, was appealable interlocutory order.

The Court of Appeals had jurisdiction of a high school principal's interlocutory appeal from an order denying his motion for summary judgment, which was based in part on assertion of qualified immunity against student's civil rights claim, under collateral order exception to general finality requirement.

An order granting partial summary judgment was appealable pursuant to the exception for appeals from orders "changing or affecting possession of real property," where the order transferred possession of property from its owners and placed it under control of a trustee to manage, to collect rents and profits, and to sell; moreover, the order finally resolved nature and extent of each party's interest in the property.

Trial court's grant of summary judgment against the government in its suit to quiet title in property bid off to it in tax sale was properly appealed as an interlocutory order changing or affecting possession of property, even though trial court had not ruled on allegation of wrongful eviction resulting from allegedly invalid tax sale.

An order vacating a default judgment against a landlord and effectively restoring a tenant to possession of premises was appealable, interlocutory order.

24 Appeal of administrative decisions

The District of Columbia Court of Appeals has jurisdiction to review orders and decisions of certain specified administrative agencies of the District. However, the Court of Appeals has jurisdiction to review order or decision of the mayor or an agency only in a contested case. A court reviewing a record of an administrative proceeding must examine whether the agencies findings are supported by substantial evidence and if conclusions of law followed rationally from the findings or whether the action was arbitrary capricious or an abuse of discretion. The Court of Appeals may not substitute its own judgment. On appeals of Superior Court's rulings on review of administrative decisions, the Court of Appeals' scope of review is precisely the same as that which it employs in cases that come directly before the Court of Appeals.

Illustration: The Court of Appeals lacked jurisdiction to hear direct appeal from decision of Board of Elections and Ethics denying petitioner's challenge to qualifications of prospective candidate for council seat on residency grounds filed before the Board finally determined candidate's eligibility.

As with federal courts, the All Writs Act is the source of the District of Columbia Court of Appeals' authority to issue temporary relief pending administrative review in a contested case over which the court would eventually have direct reviewing authority.

25 United States District Court for the District of Columbia

The United States District Court for the District of Columbia has jurisdiction of any civil action or other matter begun in the court before the effective date of the District of Columbia Court Reorganization Act of 1970, except for certain matters within the jurisdiction of the Superior Court of the District of Columbia, and various other civil actions and matters, depending on the designated statutory periods beginning on the effective date of the reorganization act. Jurisdiction is also conferred on the United States District Court for the District of Columbia of any civil action begun in the court during the thirty-month period beginning on the effective day of the reorganization act wherein the amount in controversy exceeds that specified in the code provision; excluded from this provision, however, are actions involving matters over which the Superior Court is given specific jurisdiction under the code.

Illustration: Despite provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, under law pertaining to federal question jurisdiction, references to laws of the United States or acts of Congress do not include laws applicable exclusively to the District of Columbia, the District Court for the District of Columbia retained full federal question subject matter jurisdiction, and had jurisdiction over a complaint raising a constitutional challenge to a local District of Columbia statute.

Caution: A later case has held that reference to law of the United States would not include provisions of the DC Code enacted by Congress. Shifrin v. Wilson, 412 F. Supp. 1282 (D.D.C. 1976). However, the District of Columbia Home Rule Act does not apply exclusively to the District of Columbia; thus, the Act could provide a basis for the exercise of federal question jurisdiction in an action brought by former employees of the United States Department of Labor who were transferred to the District of Columbia Department of Employment Services, seeking an injunction which would either reinstate them to the federal competitive service or would grant them identical rights, benefits and privileges.

In addition, the United States District Court for the District of Columbia has jurisdiction under the code of various classes of criminal offenses in addition to its jurisdiction as a United States District Court and any other jurisdiction conferred on it by law.

The Federal Rules of Civil Procedure provide that whenever the law of a state in which the District Court is held is made applicable in such rules, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. The law to be applied under this rule is not that law which is generally applicable as federal law elsewhere as well as in the District, but rather that law which is locally applicable in the District. Federal courts located in the District of Columbia will apply choice-of-law and substantive decisional rules of District of Columbia courts when appropriate although, because of the District's unique position, the Rules of Decision Act does not bind federal courts to that result, the District's law is applied out of deference to authority of the District of Columbia Court of Appeals as the highest court of the District and in order not to subvert the aims of the Erie doctrine.

The term "state" includes the District of Columbia where appropriate, and that the term "statute of the United States" includes acts of Congress locally applicable in the District of Columbia.

26 United States Court of Appeals for the District of Columbia Circuit

In addition to its jurisdiction as a United States Court of Appeals and as otherwise conferred by law, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction of appeals from judgments of the District of Columbia Court of Appeals with respect to violations of criminal laws of the United States which are not applicable exclusively to the District of Columbia if a petition for allowance of an appeal from the judgment is filed within the statutory time after entry thereof, or entered before the effective date of the District of Columbia Court Reorganization Act of 1970 in any other case if a petition for allowance of an appeal from the judgment is filed within a designated time after its entry.

Practice guide: Decisions rendered by the United States Court of Appeals for the District of Columbia Circuit prior to the effective date of the Court Reorganization Act, even if subsequently overruled by that court, would remain valid and binding case law in the District of Columbia court system until such time as they might be modified or set aside by the District of Columbia Court of Appeals.

The Court of Appeals for the District of Columbia Circuit has the power to adopt a narrowing construction of a provision enacted by Congress rather than by the District of Columbia council.

Observation: The traditional policy of the Supreme Court of the United States is to refuse to review a determination of local law of the District of Columbia by the Court of Appeals for the District of Columbia Circuit in all but exceptional cases.

27 Generally

In accordance with the rule applicable to municipal corporations generally, the District of Columbia is liable in tort for injuries caused in the exercise of a proprietary, as opposed to a governmental, function. The District of Columbia could be held liable for tortious acts of one of its employees against another, however, supervisory employees could not be held liable under theory of respondeat superior.

Illustration: The District of Columbia was liable to respond in damages, under the theory of respondeat superior, for the intentional torts of its police officers acting within the scope of their employment. However, the District of Colum-

bia was not liable for injury and wrongful death of lifeguards employed by an independent contractor who leased a swimming pool from the District, where the District had no actual control or responsibility over the swimming pool at the time of the accident.

The District is responsible for such negligence of its employees or officers having the care of streets, avenues, and sidewalks as results in personal injuries to individuals. The neglect of district officers to keep the public ways of the city in safe condition is the neglect of the municipal corporation, although they are subject to the permanent authority of Congress; the fact that the fee simple of the streets of the City of Washington is in the United States does not affect such liability.

Observation: Public interest may often be implicated in greater measure in cases in which District of Columbia is party than in purely private litigation, and appellate courts should not be blind to such considerations.

28 Operation of motor vehicle

Under the District of Columbia Code, the defense of governmental immunity may not be asserted by the District in any suit at law against it to recover money damages for death or injury to person or property caused by the negligence of an employee of the District in the operation of a motor vehicle within the scope of his office or employment.

In the case of a claim arising out of the operation of an emergency vehicle on an emergency run, the District is liable only for gross negligence.

Illustration: No plain error or miscarriage of justice occurred when a trial court incorrectly instructed a jury that the District of Columbia could be liable on negligent supervision theory even if no representative of District was found to be grossly negligent; the District never objected to the instruction or expressed dissatisfaction with it, and, in its proposed verdict form, the District effectively invited trial court to treat negligent supervision as requiring only ordinary negligence.

29 Notice requirements

The District of Columbia Code provides that no action may be maintained against the District for unliquidated damages to person or property unless, within the time designated after the injury or damages was sustained, notice in writing is given to the commissioner (mayor) of the District with respect to the approximate time, place, cause, and circumstances of the injury or damage. Minor inaccuracies in the notice are not ordinarily fatal to the cause of action. Inquiry into the adequacy of a notice is limited to the information contained in the notice. Compliance with the notice requirement is a question of law that the Court of Appeals reviews de novo.

30 Settlement of claims

The District of Columbia Code authorizes the mayor of the District, in his discretion, to settle claims founded on torts of District employees where the District, if a private individual, would be liable prima facie to respond in damages, irrespective of whether the negligence occurred in the performance of a municipal or governmental function of the District.